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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 445

AVCO CORPORATION,

Petitioner,

v.

AERO LODGE No. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

FRANCIS J. NAPHIN
WARREN G. SULLIVAN
DON A. BANTA
105 West Adams Street
Chicago, Illinois 60603

WILLIAM WALLER
ROBERT G. McCULLOUGH
1200 American Trust Building
Nashville, Tennessee 37201

JOHN B. HOLLISTER
J. MACK SWIGERT
603 Dixie Terminal Building
Cincinnati, Ohio 45202
Attorneys for Petitioner

M. A. McLAUGHLIN
750 Third Avenue
New York, New York 10017
Of Counsel

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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REPLY BRIEF FOR THE PETITIONER

SUMMARY OF ARGUMENT

The Petitioner and the Respondents are in full agreement that the criterion to be applied in deciding this case is the *intention of Congress.*

It is clear from the legislative history that in enacting Section 301 in 1947, Congress had no intention of extending the provisions of the Norris-LaGuardia Act to state courts either directly or by indirection. On the contrary, Congress affirmatively intended to continue the operation of Norris-LaGuardia unchanged. Norris-LaGuardia in 1947—as now—applied only to "courts of the United

States." As of 1947, state courts had and exercised jurisdiction to enjoin strikes in breach of contract. Such suits were not removable.

The House of Representatives' proposal to make the restrictions of Norris-LaGuardia inapplicable to Section 301 suits brought in "courts of the United States" and the Senate proposal to have the NLRB seek federal court injunctions against strikes in breach of contract were dropped in conference in 1947 in reliance on assurances that nothing in Section 301 would "encroach upon the existing jurisdiction of the state courts." [1] The manifest intention was to allow state courts to continue, as in the past, to grant the injunctive relief which had been unavailable in federal courts since the enactment of Norris-LaGuardia in 1932.

The Respondents' brief hardly touches on the specifics of whether Congress intended, in 1947, to extend Norris-LaGuardia to state courts. Obviously, the Respondents could find no legislative history to support such a contention, because there is none. The legislative history is to the contrary.

> *"The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recogized and obeyed."* (emphasis added) [2]

To construe Section 301 as the Respondents now contend, so that the removal sections of the Judicial Code are triggered into action by Section 301, would completely frustrate the intention of Congress which all agree should be the criterion. It would accomplish by indirection a result opposite to that intended by Congress.

Nothing in Norris-LaGuardia, in Section 301, or in the removal provisions (28 U.S.C. 1441(b)) requires such a

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[1] Charles Dowd Box Co. v. Courtney (1962) 368 U.S. 502, 509, 7 L. Ed. 2d 483.

[2] United States v. Hutcheson (1941) 312 U.S. 219, 235, 85 L. Ed. 788.

frustration of Congressional intention. Norris-LaGuardia itself has never applied to state courts and, therefore, cannot be regarded as reflecting a "national" labor policy, applicable to all tribunals. The "basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." [3] And for removal under 1441(b) the action must "arise under", which means must be "created by", federal statute. A right which has been "absorbed" and "fashioned" into federal law from state law by federal courts, rather than by specific legislation of Congress, is not a right "created by" and thus "arising under" the laws of the United States within the meaning of Section 1441(b). Congress in permitting federal suits under Section 301 did not "destroy the foundation upon which it" built. Rights were created by Tennessee and Petitioner sought to enforce them.

Also, a civil action seeking an injunction for strike in breach of contractual promise is not a civil action of which "district courts have original jurisdiction" within the meaning of 1441(b). Norris-LaGuardia was intended to deprive federal courts of any power to entertain such suits and its drafters achieved that purpose. It deprives district courts of "original jurisdiction" over such a civil action.[4] The word "jurisdiction" means the same in Norris-LaGuardia as in Section 1441(b).

This case calls for "common-sense accommodation" [5] to reflect the intention of Congress. It is abundantly clear from the legislative history and from previous decisions of this Court that in enacting Section 301 Congress had "com-

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[3] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 508-09, 7 L. Ed. 2d 483.

[4] Sinclair Refining Co. v. Atkinson (1962) 370 U.S. 195, 8 L. Ed. 2d 440.

[5] Gully v. First National Bank in Meridian (1936) 299 U.S. 109, 117, 81 L. Ed. 70.

plete awareness of both the existence and the limitations of state court remedies for violation of collective agreements." [6] Also, the purpose of Congress "was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." [7] Accordingly, as Congress "has intimated its will", Section 301, Norris-LaGuardia and Section 1441 (b) should be construed in such a way that the restrictions of Norris-LaGuardia continue to apply only to federal courts leaving state forums free, without removal, to enforce labor contracts through their "usual processes." These include restraining orders and injunctions.

Other arguments advanced by the Respondents and Amicus Curiae, American Federation of Labor and Congress of Industrial Organizations, likewise must be rejected. The contention that "a strike injunction is precluded by the terms and tenor" of the agreement between the parties in the instant case is an argument for the state court on the merits and not for a federal court determining the narrow issue of removal. The Respondents elected an attempted removal rather than presentation of this issue to the state court. Likewise, the nature of the state court order and the claimed incompetence of state court judges are arguments quite irrelevant to the removal issue. Restraining orders are not *per se* an "evil", but are a time honored and essential defensive weapon in the arsenal of Equity for the protection of individual litigants and of society itself. Contrary arguments relating to the claimed "evil" of injunctions should be for Congress or state legislatures and not properly for this Court. They have no relevancy to the removal issue.

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[6] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 510, 7 L. Ed. 2d 483.

[7] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 511, 7 L. Ed. 2d 483.

The law review article on which Respondents place principal reliance sheds more heat than light and contains arguments quite irrelevant to the removal issue.

The Respondents' "uniformity" argument is erroneous. Uniformity is not the "desideratum of national labor policy" as demonstrated by *Dowd*,[8] *Hoosier Cardinal*[9] and other decisions. Our federal system encourages "diffusion", not "uniformity", absent specific declaration of Congress not present here.

There is no evidence that in enacting Section 301 Congress intended to prevent "forum shopping." Instead the expressed Congressional purpose was "not to abolish existing state court jurisdiction."[10]

The Federal Rules of Civil Procedure are inapplicable in determining whether a cause is removable.

Zwickler v. *Koota* (1967) 389 U.S. 241, 19 L. Ed. 2d 444, cited by the *Amicus* is inapplicable because the instant case does not involve the issue of federal court "abstention."

The *Amicus* is also in error in stating that a purpose of the removal statute was to insure "that no federal question case is tried in a state court unless both parties wish to have it tried there." (Amicus br., p. 9) There are many instances in which cases involving federal questions are tried in state courts without right of removal.

Injunctions are the only effective remedy against "wildcat" strikes in breach of contract. Their availability to management strengthens the hand of responsible union leaders who want to keep contract promises and maintain labor peace during the contract term. In this era of economic interdependence and concentration of union power, the continued availability of this form of specific perfor-

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[8] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483.

[9] UAW v. Hoosier Cardinal Corp. (1966) 383 U.S. 696, 16 L. Ed. 2d 192.

[10] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 512, 7 L. Ed. 2d 483.

mance is essential for the protection of employers, responsible employees, and the consuming public. Without injunctive relief whole cities can be paralyzed. Certainly our system of compulsory collective bargaining assumes and requires full performance of collective agreements. Only state court injunctive relief can assure such performance.

ARGUMENT

I. The Criterion Is the Intention of Congress.

The Petitioner and the Respondents agree that the criterion to be applied in deciding this case is the *intention of Congress.* The Respondents concede that "the problem, if one exists, and a solution, if one is desired, is for Congress." (Resp. br., pp. 16, 70) Quoting from *Sinclair Refining Co.* v. *Atkinson* (1962) 370 U.S. 195, 215, 8 L. Ed. 2d 440, they state that " 'it is a question for lawmakers, not law interpreters.' " (Resp. br., p. 70)

The dominance of Congressional "intention and objective" in construing the critical statutes was likewise stressed by the Petitioner in its brief. (pp. 33-35 and 36)

II. Congress Intended that State Courts Should Retain Their Existing Jurisdiction to Enjoin Strikes in Breach of Contract.

It is clear from the legislative history that in enacting Section 301 in 1947, Congress had *no* intention of extending the provisions of the Norris-LaGuardia Act to state courts, either directly or by indirection. On the contrary, Congress affirmatively intended to continue the operation of Norris-LaGuardia unchanged. Norris-LaGuardia in 1947—as now—applied only to "courts of the United States." As of 1947, state courts had and exercised jurisdiction to enjoin strikes in breach of contract. Such suits were not removable.

A proposal to make the restrictions of Norris-LaGuardia inapplicable to Section 301 suits brought in "courts of the United States" and a proposal to have the NLRB seek injunctions in such cases were dropped in conference in 1947 in reliance on assurances that nothing in Section 301 would "encroach upon the existing jurisdiction of the state courts." [11]

In *Dowd Box, supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, the Court stated that in considering "the proposed legislation in 1946", which was the precursor of the 1947 Act, "Congress manifested its complete awareness of both the existence and the limitations of state court remedies for violation of collective agreements." 368 U.S. at 510. Some members of the House believed that the need for injunctive relief for strikes in breach of contract was so great that such injunctions should be obtainable in federal courts as well as state courts. Accordingly, as noted by this Court in *Sinclair Refining Co.* v. *Atkinson, supra* (1962) 370 U.S. 195, 205-06, 8 L. Ed. 2d 440, the House bill in 1947, in Section 302(e), provided that in suits for violation of labor contracts Norris-LaGuardia restrictions "shall not have any application in respect of either party." H.R. 3020, 80th Cong., 1st Sess. (1947); 1 Leg. Hist. of the L.M.R.A., 1947, 221-22. The Senate bill contained no such provision, but provided that breach of contract would be an unfair labor practice with injunctive relief available in federal courts through the NLRB.[12] These provisions were compromised out by the Joint Conference Committee through agreement that relief for breach of collective agreements would "be left to the usual processes of the law." H.R. Conf. Rep. No. 510, H.R. 3020, 80th Cong., 1st Sess., pp. 41-42; 1 Leg. Hist. 545-46; *Sinclair Refining Co.* v. *At-*

[11] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 509, 7 L. Ed. 2d 483.

[12] Sections 8(b)(5) and 10(j) of H.R. 3020, 80th Cong., 1st Sess. (1947) as passed Senate, 1 Leg. Hist. 241-42, 258.

kinson, supra (1962) 370 U.S. 195, 207-08, 8 L. Ed. 2d 440. As this Court has found, it was agreed by the conferees that "no change in the *existing* anti-injunction provisions of the Norris-LaGuardia Act should be made." 370 U.S. at 207 (emphasis added). The "existing" anti-injunction provisions of Norris-LaGuardia applied only to *federal* courts. This fact was stated repeatedly by this Court in its *Sinclair* opinion.[13]

Obviously, it was because of this agreement between the members of the House and Senate that Senator Ball, one of the floor leaders for the bill, later stated on the floor of the Senate:

> "[W]e give to employers the right to sue a union in interstate commerce, in a Federal court, for violation of contract. It does not go beyond that." 93 Cong. Rec. 5014 (1947); *Dowd, supra*, 368 U.S. at 512.

The agreement underscores the correctness of the statement in *Dowd* that:

> "The clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." 368 U.S. at 511.

The Court also stated that:

> "The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." 368 U.S. at 508-09.

As this Court observed in *United States* v. *Hutcheson* (1941) 312 U.S. 219, 85 L. Ed. 788:

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[13] Sinclair Refining Co. v. Atkinson, *supra* (1962) 370 U.S. 195, 196, 203, 211, 214, 8 L. Ed. 2d 440.

"The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." 312 U.S. at 235 (emphasis added).

III. Nothing in Section 301, in Section 1441(b), or in Norris-LaGuardia Requires Frustration of the Congressional Intent.

A. The Action Is Not "Founded on a Claim or Right Arising Under the Constitution, Treaties or Laws of the United States."

The Respondents state:

> "Section 301 is the sole source of right that petitioner can invoke. Federal law is the exclusive determinant of the validity, interpretation, and enforcement of the contract which petitioner alleges has been violated. The action therefore is one 'arising under' a law of the United States." (Resp. br., pp. 7-8, 17-20)

It is submitted that such reasoning is erroneous.

This Court has stated that "A suit arises under the law that creates the cause of action." [14] We submit that the law that *created* the cause of action in the instant case was the law of Tennessee, authorized by the Tenth Amendment to the Constitution of the United States.

The mere fact that suit against the union as an entity was authorized by Section 301, that this Court has subsequently held that the substantive law to be applied is to be fashioned by federal courts, and that "any state law applied . . . will be absorbed as federal law", does not mean the action is "founded on a claim or right arising under the Constitution, treaties or laws of the United States."

In the leading case of *Gully* v. *First National Bank in Meridian* (1936) 299 U.S. 109, 81 L. Ed. 70, a federal statute authorized state taxation of stock in national banks,

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[14] American Well Works Co. v. Layne & Bowler Co. (1916) 241 U.S. 257, 260, 60 L. Ed. 987.

subject to specified restrictions. The defendant had contracted to assume the obligations of an insolvent national bank. The state tax collector sued the defendant in the state court to collect the amount of the tax. The defendant sought to remove the action to federal court, claiming that the right of the state to impose the tax in issue arose under a law of the United States and that the action was, therefore, removable. This Court directed remand, stating:

> "That there *is* a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid." 299 U.S. at 115.

The Court said:

> "Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. . . . With no greater reason can it be said to arise thereunder because permitted thereby." 299 U.S. at 116.

In setting forth certain tests to determine whether a cause arises under the law of the United States, the Court stated:

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." 299 U.S. at 115.

The Court said:

> "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if

> the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto. . . ." 299 U.S. at 112-13.

The Court concluded its opinion in *Gully* with a "common-sense" test which it referred to as its "compass." The Court said:

> "To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards. . . . What is needed is something of that *common-sense accommodation of judgment to kaleidoscopic situations* which characterizes the law in its treatment of problems of causation. . . . We shall be lost in a maze if we put that compass by." 299 U.S. at 117-18 (emphasis added).

Applying the "common-sense" compass to the instant case, it seems evident that the Petitioner's action did not arise under a law of the United States. It is elementary, of course, that:

> ". . . the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a 'suit arising under' . . . [a] law of the United States by his declaration or bill." *The Fair* v. *Kohler Die & Specialty Co.* (1913) 228 U.S. 22, 25, 57 L. Ed. 716; *Bell* v. *Hood* (1946) 327 U.S. 678, 681, 90 L. Ed. 939.

The Petitioner in the instant suit clearly relied on state law. It filed a "Bill of Complaint" in the Tennessee Chancery Court which made no reference whatsoever to Section 301. It sought injunctive relief which could not be granted by a federal court. The Petitioner sought to avail itself of the state court's "established jurisdiction over contract

actions" which this Court has found Congress intended to permit and had no intention of taking away.

The fact that, under *Textile Workers Union* v. *Lincoln Mills* (1957) 353 U.S. 448, 457, 1 L. Ed. 2d 972, "any state law applied" by the Tennessee court "will be absorbed as federal law" does not alter the situation. The test under Section 1441(b) is whether the Petitioner's claim is one "arising under" Tennessee law or Section 301. As stated above, "A suit arises under the law that creates the cause of action." [15]

Section 301 did not "create" the state law which has been "absorbed." That state law was *created* by the State of Tennessee. One who acquires a Degas or a Rembrandt does not "create" the painting. The contract rights sought to be enforced in this proceeding are rights which arose under state law subsequently absorbed and fashioned by federal courts into federal law. They are not rights created by Congress itself and cannot, in "common-sense" be regarded as rights "arising under" Section 301. This is particularly true if one bears in mind the overriding intention of Congress referred to above—"to fill the gaps in the jurisdictional law of some of the states, not to abolish existing state court jurisdiction. . . . It does not go beyond that." *Dowd Box, supra*, 368 U.S. at 512. ". . . Congress did not intend this remedial measure to destroy the foundation upon which it was built." 368 U.S. at 513.

Other decisions of this Court support the *Gully* rule that not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. In *Puerto Rico* v. *Russell & Co.* (1933) 288 U.S. 476, 77 L. Ed. 903, Congress had passed a statute somewhat analogous in effect to Section 301 specifically authorizing the Treasurer of Puerto Rico to sue in court to collect taxes owed by

[15] American Well Works Co. v. Layne & Bowler Co., *supra* (1916) 241 U.S. 257, 260, 60 L. Ed. 987.

Puerto Ricans under the laws of Puerto Rico. Subsequently, the Treasurer of Puerto Rico brought a tax collection suit in the Insular Court of San Juan. The defendant, claiming that the suit was one "arising under" the law of the United States, sought to remove the case to the United States District Court at San Juan. This Court directed remand. It stated that:

> "*. . . even though petitioner derived its authority to maintain the suit from the Act of Congress, it did not arise under the laws of the United States within the meaning of the jurisdictional statutes.*
>
> "The suit was brought to recover assessments levied under the Act of the Puerto Rico legislature, but not to enforce a right created by a law of the United States. No question of interpretation or enforcement of the federal statute appears upon the face of the complaint. Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive —not the source of the authority to establish it." 288 U.S. at 483 (emphasis added).

Likewise, in *Shoshone Mining Co.* v. *Rutter* (1900) 177 U.S. 505, 44 L. Ed. 864, this Court had before it an Act of Congress which authorized the bringing of "adverse suits" to determine the title to mining lands. The federal statute specified that the right of possession might be determined by "local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States" or "by the statute of limitations for mining claims of the state or territory where the same may be situated." Thus, Congress sought to "absorb" state law much as this Court did

in *Lincoln Mills*. In *Shoshone*, the plaintiff filed his "adverse suit" in the state court. The defendant removed. This Court directed remand. Referring to the federal statute, the Court observed that:

> ". . . in a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact.
>
> "The recognition by Congress of local customs and statutory provisions *as at times controlling the right* of possession does not incorporate them into the body of Federal law." 177 U.S. at 508.

The Court further stated that:

> "Inasmuch, therefore, as the 'adverse suit' to determine the right of possession may not involve any question as to the construction or effect of the Constitution or laws of the United States, but may present simply a question of fact as to the time of the discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, or the effect of state statutes, it would seem to follow that it is not one which necessarily arises under the Constitution and laws of the United States." 177 U.S. at 509.[16]

While preserving pre-existing state court jurisdiction, Congress permitted the bringing of suits to enforce collective agreements in federal courts by Section 301. Congress did not abolish "the existing jurisdiction of state courts." [17] Petitioner sought only to avail itself of rights created by the State of Tennessee, in the courts of Ten-

[16] See also, Roecker v. United States (CA 5; 1967) 379 F.2d 400, 407-08 *cert. denied* (1967) 36 U.S.L.W. 3237; T. B. Harms Co. v. Eliscu (CA 2; 1964) 339 F.2d 823, 828.

[17] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 509, 7 L. Ed. 2d 483.

nessee. Subsequent proceedings in that court might have raised questions to be decided under applicable principles of federal substantive law. Petitioner raised none. Petitioner asked only for its rights created by the laws of Tennessee. As this Court stated in *Dowd* analyzing Section 301, ". . . Congress did not intend this remedial measure to destroy the foundation upon which it was built." 368 U.S. at 513.

B. The District Court Lacks "Jurisdiction" of *the Cause.*

In their brief (pp. 22-38), the Respondents have placed heavy emphasis on their contention that Norris-LaGuardia only limits the "equity jurisdiction" of federal courts and does not constitute "a divestiture of subject matter jurisdiction." We believe, on the contrary, that Congress meant exactly what it said when it employed the word "jurisdiction"—and not the phrase "equity jurisdiction"—throughout Norris-LaGuardia.

The Congressional employment of the naked noun "jurisdiction" throughout Norris-LaGuardia is discussed on pages 38-39 of our brief and in footnote 36 thereof. Congress did not say "equity jurisdiction." It said "jurisdiction." Indeed, as pointed out on the pages referred to, Congress peppered the Act with the word "jurisdiction", even defining the Act in part as one to "limit the jurisdiction of courts sitting in equity." [18]

The reason for Congress' usage of the big word "jurisdiction" in Norris-LaGuardia was indicated by this Court in *Sinclair Refining Co.* v. *Atkinson*, *supra* (1962) 370 U.S. 195, 203, 8 L. Ed. 2d 440:

> "We cannot ignore the plain import of a congressional enactment, particularly one which, as we have repeat-

[18] United States v. United Mine Workers (1947) 330 U.S. 258, 313, 91 L. Ed. 884.

> edly said, was *deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction.*" (emphasis added).

The Court stated that, "For these reasons, the Norris-LaGuardia Act deprives the courts of the United States of *jurisdiction* to enter that injunction. . . ." 370 U.S. at 203 (emphasis added). The Court concluded that:

> "The District Court was correct in dismissing Count 3 of petitioner's complaint for *lack of jurisdiction under the Norris-LaGuardia Act.*" 370 U.S. at 215 (emphasis added).

In arriving at its conclusion that Congress deliberately employed the "broadest of terms" in Norris-LaGuardia and that the District Court, therefore, lacked "jurisdiction" of the cause filed in federal court, this Court no doubt had in mind the words of Mr. Justice Frankfurter, partially quoted in footnote 36 of our brief, stating:

> "The Norris-LaGuardia Act has specific origins and definite purposes and should not be confined by an artificial canon of construction. The title of the Act gives its scope and purpose, and the terms of the Act justify its title. It is an Act 'to define and limit the jurisdiction of courts sitting in equity.' It does not deal with the rights of parties but with the power of the courts. Again and again the statute says 'no court shall have jurisdiction,' or an equivalent phrase. Congress was concerned with the withdrawal of power from the federal courts to issue injunctions in a defined class of cases." [19]

It is evident that Congress used the big word "jurisdiction" —and meant it—in order to give the greatest possible assurance that no federal court would thereafter, by any

[19] *Id.* See also Frankfurter and Greene, The Labor Injunction (1930) pp. 208-11.

device whatsoever, seek to enjoin concerted activities of employees as a "conspiracy" in restraint of trade.[20] Bearing Congressional intention in mind, it seems evident that "jurisdiction" means "jurisdiction" in Norris-LaGuardia. And "jurisdiction" is the very word employed by Congress in Section 1441(b).

In attempting to add the modifying adjective "equity" before the general noun "jurisdiction" employed by Congress, the Respondents admittedly lean heavily on an analysis by Professor Chafee. (Resp. br., p. 37) Professor Chafee, in turn, placed his principal reliance on "Mr. Justice Stone's distinction in the *Di Giovanni* case [296 U.S. 64, 69]." (Resp. br., p. 37)[21] Chafee, paraphrasing Mr. Justice Stone, stated that Norris-LaGuardia,

> ". . . does not fix a limit on the 'power of a federal court to act'; it merely answers the question 'whether the case is one for the peculiar type of relief which a court of equity is competent to give.'"

This reference to Mr. Justice Stone's opinion contains a significant and critical omission. Mr. Justice Stone actually stated, in the sentence referred to by Professor Chafee:

> "Whether a suitor is entitled to equitable relief in the federal courts, *other jurisdictional requirements being satisfied*, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give." 296 U.S. at 69 (emphasis added).

In the quoted paragraph, the distinguished professor has simply ignored the critical phrase "other jurisdictional re-

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[20] The Respondents concede that proponents of Norris-LaGuardia desired that "the conspiracy and other doctrines which are fundamental in the law of labor combinations should be specifically annihilated." (Resp. br., p. 54, n. 33).

[21] Di Giovanni v. Camden Fire Insurance Ass'n (1935) 296 U.S. 64, 80 L. Ed. 47.

quirements being satisfied." In the instant case, "other jurisdictional requirements" have not been satisfied. Norris-LaGuardia establishes a specific and crucial jurisdictional requirement—and one which cannot be satisfied in the instant case. That statute specifically deprives federal courts of "jurisdiction and authority" to "issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute" unless certain circumstances not present in the instant case are alleged and proved.

The difference between the instant case and *Di Giovanni* is apparent. *Di Giovanni* was not a removal case. The plaintiff there sought to invoke equity jurisdiction by combining damage actions which did not meet the jurisdictional minimum applicable in diversity cases and contending that as there was no legal remedy in the federal court, the plaintiff was entitled to equitable relief to avoid multiplicity of suits. The Court concluded that:

> ". . . want of the jurisdictional amount in controversy which deprives a federal court of its authority to act at law is not ground for invoking its equity powers." 296 U.S. at 69-70.

The Court concluded that the jurisdictional minimum was "applicable alike to suits at law and in equity", thus holding, as this Court should in the instant case, that "other jurisdictional requirements" were not satisfied. 296 U.S. at 69-70.[22]

In *Sinclair Refining Co.* v. *Atkinson*, *supra* (1962) 370 U.S. 195, 209, 8 L. Ed. 2d 440, the Court rejected "accommodation" and "judicial obliteration" of the language of

[22] Bakery Sales Drivers Union v. Wagshal (1948) 333 U.S. 437, 92 L. Ed. 792, cited by the Respondents at pages 34-35, throws no light on the problem. The result would have been the same whether the word jurisdiction placed in the Act was construed as the Petitioner here contends or as the Respondents contend. The point at issue was the scope of Section 4's definition of "a labor dispute" and the appellate courts' jurisdiction.

Norris-LaGuardia and gave a literal construction to that Act. The Court emphasized that it was going to construe Norris-LaGuardia to get "a correct judicial interpretation of the *language of the Act as it was written by Congress.*" 370 U.S. at 202 (emphasis added). The Court stated that Norris-LaGuardia was "*deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction.*" 370 U.S. at 203 (emphasis added). In footnote 13, the Court stated that:

> "The rights of the parties and *the jurisdiction of the federal courts* are to be determined according to the express provisions applicable to labor disputes as so defined." 370 U.S. at 203 (emphasis added).

The Court specifically concluded that, "[f]or these reasons, the Norris-LaGuardia Act *deprives the courts of the United States of jurisdiction* to enter that injunction. . . ." 370 U.S. at 203 (emphasis added). Indeed, this literal construction placed on the Act by the *Sinclair* majority led one dissenting Justice to refer in his opinion to "today's literal reading" and to predict that "if § 4 is to be read literally, removal will not be allowed." 370 U.S. at 226-27. Accordingly, this Petitioner cannot believe that this Court, having construed Norris-LaGuardia literally in deciding that employers may not seek injunctions for breach of labor contracts in federal courts, will now construe Norris-LaGuardia less literally when the effect of so doing will be to close the doors of state courts to injunctions against strikes in breach of contract, disregarding clear Congressional intent.

Respondents' argument that Norris-LaGuardia preserved "jurisdiction" (they denominate as "subject matter jurisdiction") in federal courts in these cases is erroneous for yet another reason. It completely overlooks Norris-LaGuardia's historical setting. In 1932, six years prior to

the union of law and equity in federal courts, it was clear beyond doubt that no suit for injunction was cognizable "at law." [23] Jurisdiction of such suits lay "in equity." This Court had long since held that where a federal court sitting "in equity" acted beyond its "jurisdiction" its judgment was "null and void." *In Re Sawyer* (1888) 124 U.S. 200, 221, 31 L. Ed. 402. Just six years before enactment, in 1926, this Court had held that "jurisdiction" meant the "power to entertain the suit, consider the merits and render a binding decision thereon . . . ." *General Investment Co.* v. *New York Central Railroad* (1926) 271 U.S. 228, 230, 70 L. Ed. 920.[24] Thus, Congress in "limiting the jurisdiction of courts sitting in equity" was nailing the doors to federal courts shut tight. No federal court had power to entertain a suit seeking such relief. Respondents' arguments based upon the Federal Rules (not promulgated until 1938) and Moore's remarks on federal practice under them are simply anachronisms.

For example, on page 25 of the Respondents' brief, Moore is quoted as saying that the "prayer for relief constitutes no part of the pleader's cause of action", but Moore was merely discussing the provision to such effect contained in Federal Rule 54(c). We have pointed out on pages 43-44 of our brief why Rule 54(c) is inapplicable in resolving the jurisdictional question here presented.[25] Actually, the very language of Norris-LaGuardia makes the prayer of the complaint the benchmark of jurisdiction. The statute deprives the federal court of jurisdiction "to issue any

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[23] 1 Pomeroy, Equity Jurisprudence §§ 137-38 (4th Ed. 1918); Conformity Act of June 1, 1872, § 5, 17 Stat. 196-97.

[24] The additional portions of the quotation italicized by the Respondents on page 24 of their brief detract in no way from the controlling force of the above definition because they relate to only one element of the jurisdictional equation.

[25] Respondents' citation of 6 Moore's Federal Practice on page 25 of its brief similarly relates solely to actions brought in the federal courts to which Rule 54 would clearly be applicable.

restraining order or temporary or permanent injunction . . ." [26] One must look at the prayer to see whether the Petitioner has sought the type of relief which deprives the court, under the language of the statute, of "jurisdiction." [27]

At pages 35-37, the Respondents refer to statutes other than Norris-LaGuardia which have been related to courts' "general equity powers." None of these statutes employs the critical noun "jurisdiction" which was used by Congress throughout Norris-LaGuardia. This demonstrates that Congress intended to shut the door in Norris-LaGuardia and did not intend to do so in enacting the other statutes. And the language and scope of each statute is significantly different from that of Norris-LaGuardia.

There is no basis for the Respondents' contention, on page 26, that the Petitioner was guilty of "obduracy" because it chose to "restrict [itself] to the one form of relief not within the court's authority to grant . . . ." The relief sought was within the authority of the Chancery Court in which the Petitioner chose to file its petition. It is not "obdurate" to seek relief from the only tribunal empowered to grant it. This is not "procedural jugglery" (Resp. br., p. 26) or "game-playing" (Resp. br., p. 27) or "sleight of hand" (Resp. br., p. 28), but simply common sense. The Petitioner merely asked the Chancery Court to exercise its "existing jurisdiction" through "the usual processes of the law." (*Dowd*, 368 U.S. at 509; *Sinclair*, 370 U.S. at 207)

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[26] Section 1, 47 Stat. 70, 29 U.S.C. 101 (1964).

[27] It will also be noted that in the Bill of Complaint filed in the Chancery Court, the Petitioner alleged a "series of work stoppages" (A. 7), all of which "were sanctioned by defendant Local in violation of Article XIII of" the collective bargaining agreement and that these "constituted concerted action on the part of defendants, and that complainant is entitled to an injunction. . . ." (A. 8) Thus, the body of the Bill of Complaint, and not simply the prayer, contained the essential allegations for a proceeding in equity entitling the Petitioner to the traditional Chancery remedy of injunctive relief.

IV. Arguments Advanced by Respondents and Amicus Curiae, American Federation of Labor and Congress of Industrial Organizations, Must Be Rejected.

A. Construction of the Avco Contract Is for the State Court.

At pages 66-67, the Respondents state that "it is strongly arguable that a strike injunction is precluded by the terms and tenor of the agreement" between the Petitioner and Respondents. Obviously, this is an argument which should be addressed, if at all, to the state court which issued the injunction. It goes to the merits and has no relevancy to the removal issue pending before this Court. Instead of attempting to present this issue to the state court, the Respondents elected to remove. This precluded any review of the correctness of the state court order.

B. The Nature of the State Court Order Is Irrelevant.

Throughout their brief, the Respondents repeatedly attack the state court injunction because it was *ex parte*, assertedly entered without notice, and not appealable because not a final order. (Resp. br., pp. 4, 59, 67-68) These contentions are irrelevant to the issue of removability. Under the statute, the right to remove turns on the nature of the claim and not whether a state court order was "final" or appealable.

Also, removal does not depend on whether a state court order was entered with or without prior notice to the other party. The Respondents' whole point is actually a red herring because, although the record is silent on the subject (A. 10), counsel for the Respondents was, in fact, notified before the application for the temporary order was presented to the Chancery Court. Even in the absence of notice, the Respondents could promptly have obtained a full hearing by merely filing a motion to dissolve the restraining order.

In the instant case, the removal issue would be the same if the injunction had been permanent and appealable, rather than temporary and not appealable, and had been issued after trial rather than before a trial on the merits.

C. The Quality of State Court Judges Is Irrelevant.

On pages 43 and 58-60, the Respondents reflect on the quality of state court judges, stating that they are "insufficiently informed" (Resp. br., p. 59) and that if removal is denied "these questions will be decided by state courts that may be inhospitable to or unaware of national labor policy." (Resp. br., p. 43) The Respondents seem to have overlooked the fact that in *Charles Dowd Box Co.* v. *Courtney, supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, this Court decided that Congress had intended for state court judges to have jurisdiction to enforce labor contracts. If the Respondents disagree with this, it would seem that these objections should be addressed to Congress.

Many federal judges, including Justices of this Court, have served as state court judges before their appointment to the federal judiciary. It is absurd to suggest that they were not as well informed, as conscientious, and as competent to construe and apply federal law when they were serving on the state bench as after they began their service as federal judges. State court judges and federal judges are not two different kinds of people.

It is elementary, of course, that under our dual system of courts, the state courts have concurrent jurisdiction with federal courts over both state and federal law unless Congress has expressly or by necessary implication granted exclusive jurisdiction to the federal courts.[28]

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[28] Moore, Federal Practice, 2nd Ed., Vol. 1, Sec. 0.6[3], pp. 227-236. "In considering the dual system we see, then, that the state courts play an important role in connection with the cases and controversies that are within federal judicial power." *Id.* at 236.

D. It Is for Congress, and Not the Courts, to Decide Whether State Court Injunctions Are to Be Abolished.

The Respondents argue at some length that injunctions to stop a strike in breach of contract are unnecessary and, indeed, "almost an irrelevancy." (Resp. br., pp. 15-16, 64-69) Such arguments, of course, are for Congress, and not this Court. Removability does not turn on whether injunctions are socially desirable, or an "evil", as the Respondents contend. The fact is that state courts have been granting such relief for generations and, as demonstrated above, Congress has not yet attempted to deprive state courts of such jurisdiction. This Court's function is to carry out the will of Congress rather than to fashion law which will frustrate the will of Congress.

The Respondents' observations on the efficacy of injunctions do underscore and highlight the urgent need for a reversal of the erroneous decision of the Sixth Circuit. The Respondents reason that:

> "The overall incidence of strikes over grievances submissible to arbitration is doubtless quite small, so that in perspective we deal with a fairly minor matter." (Resp. br., p. 15)

We know of no evidence in the record to support this statement. Even if it were true that there are today few strikes over grievances submissible to arbitration, it does not follow that this proves strike injunctions are a "minor matter." Is it not equally arguable—and much more consistent with common sense—that if this is true it is because of the ready availability of state court injunctions against such violations? It is as though one were to argue that the crime statistics issued by the FBI, showing that only a relatively few people in our population of two hundred million attempt to commit murder, prove that laws against

murder are unnecessary. Obviously, to some degree at least, the relatively small incidence of murder is because of the existence of laws which make murder a crime, and of legal remedies which punish the malefactor.

With no authority, the Respondents state that:

> "... most strikes in breach of a no-strike promise are wildcat in character and therefore unauthorized by the union, and which the union is already doing its best to stop ..." (Resp. br., p. 15)

Obviously, union leaders who may instigate a strike in breach of contract will claim the strike is "unauthorized" as a defense against possible liability. This does not mean that the strike is truly "unauthorized." But even if the Respondents' reckless and unsupported statement were true, it would not evidence a lack of need for the state court injunctive remedy. If the union is "already doing its best to stop" the strike, and cannot get it stopped, the union leadership should welcome the assistance of a state court injunctive order helping them to comply with their contractual obligation.

The Respondents state that the injunctive remedy is not needed because "the employer is free to discharge or discipline strikers and their leaders" (Resp. br., p. 15) but obviously such "discharge or discipline" may martyrize the leaders and simply prolong the work stoppage.

The Respondents make the extraordinary statement that:

> "... the system of agreed submission of grievances to arbitration and the concomitant adherence to a no-strike promise is not dependent on the availability of legal sanctions to make it work and is not repairable by legal sanctions if it does not work." (Resp. br., p. 16)

If so, why the trilogy? [29] It is as plain as daylight that the grievance-arbitration system *is* dependent on and repairable by "legal sanctions" and is *not* "essentially an autonomous system of self-government" dependent solely on the "self-determined commitment of the parties to it" as claimed by the Respondents. (Resp. br., p. 16) Far from being "an irrelevancy", the availability of the strike injunction in the state court has been one of the important sanctions encouraging union compliance with the grievance and arbitration procedures and observance of the all important no-strike promise.

The Respondents note that strikes during the term of an agreement are only approximately 11½% of the total work stoppages (Resp. br., p. 65, n. 39) and deduce from this statistic that such strikes are, therefore, a "minor matter." (Resp. br., p. 15) Department of Labor figures for 1967 show 41,000,000 man days of work lost through strikes. (67 LRR 54) 11½% of this total would be almost 5,000,000 man days of work lost in strikes while contracts were in force. This is hardly a "minor matter."

The Respondents' irrelevant remarks about the "inefficacy of a strike injunction" (Resp. br., p. 16) are answered by their own acknowledgment that the "issuance of a strike injunction determines the outcome of a strike." (Resp. br., p. 55)

In an apparent effort to stir the emotions of the Court, the Respondents repeatedly refer throughout their brief to a strike injunction as an "evil." It is true that in 1932, when Norris-LaGuardia was enacted, the type of federal court injunction which occasioned the legislation was regarded by many members of Congress as an "evil." But the prin-

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[29] United Steelworkers of America v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574, 4 L. Ed. 2d 1409; United Steelworkers of America v. American Mfg. Co. (1960) 363 U.S. 564, 4 L. Ed. 2d 1403; United Steelworkers of America v. Enterprise Wheel & Car Corp. (1960) 363 U.S. 593, 4 L. Ed. 2d 1424.

cipal injunction there under consideration was one enjoining concerted action by labor organizations on the theory that such combinations constituted a "conspiracy" in violation of the Clayton Act. In *New Negro Alliance* v. *Sanitary Grocery Co.* (1938) 303 U.S. 552, 82 L. Ed. 1012, this Court said, at page 562, that Norris-LaGuardia was enacted to "obviate the results of the judicial construction" theretofore given the Clayton Act.

In *Sinclair*, *supra* (1962) 370 U.S. 195, 8 L. Ed. 2d 440, this Court held that the broad language employed by Congress in Norris-LaGuardia must be construed literally, and so construed forbids even injunctions against breach of contract. This fact, of course, does not mean that a strike in breach of contract was the "evil" that Congress had in mind in enacting Norris-LaGuardia, and certainly does not mean that injunction against a strike in breach of contract is itself an "evil." A court order which requires the party to a contract to keep his promise cannot possibly be regarded as an "evil." An injunction to compel union compliance with a no-strike promise is a beneficent order—*not* an "evil." It is just as beneficent as an order to compel employer compliance with a promise to arbitrate a grievance.

Although the desirability of state court injunctions is for Congress and not the courts, the importance of state court injunctions and the importance of the decision in the instant case to labor peace in this country cannot be minimized by statements such as those of the Respondents discussed above.

E. The Law Review Article on Which the Respondents Place Reliance Sheds More Heat than Light.

Throughout their brief, and most particularly at pages 56-59, the Respondents place great reliance on parts of an

article on the subject published in a distinguished law review. Unfortunately, many of the intemperate arguments set forth in the article are erroneous on their face and, thus, throw little light on the problems presented to this Court by the instant petition.

The author of the article says state court judges "will have only slight familiarity, if any, with industrial relations practice" and frequently

> ". . . will have only meager knowledge of labor law. Add to these disadvantages a crowded docket prompting a perfectly natural desire to get rid of the case and it becomes apparent that there is little chance that the judge will probe deeply enough beneath the plaintiff's allegations and the defendant's answers and become sufficiently well informed about the case to reach a reasonable judgment concerning the need for a restraining order." (Resp. br., p. 58)

But there is no reason to believe that a state court judge would have more "desire to get rid of the case," or less familiarity with industrial relations practice and labor law, than a federal district judge. Congress decided, as this Court concluded in *Dowd, supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, that state court judges were sufficiently competent to hear damage suits. If so, they are surely sufficiently competent to decide injunction suits.

The author's attack on "rules of evidence" which "practically always assure that [the judge] will not hear enough that is relevant" (Resp. br., p. 58) would also apply equally to federal courts. Congress believes in rules of evidence. In Section 10(b) of the Act, it required even the National Labor Relations Board to apply "so far as practicable" the "rules of evidence applicable in the district courts." 29 U.S.C. § 160(b) (1964).

The author criticizes state court judges who grant temporary restraining orders because statistics for Los Angeles

County show that subsequently such judges tend to grant "motions for preliminary injunctions in the same cases." (Resp. br., p. 58) He claims this shows,

> ". . . that judges, like the rest of us, are not receptive to suggestions that they may have acted precipitously or incorrectly and should publicly confess error by reversing themselves." (Resp. br., p. 58)

Or possibly it shows they were right the first time.

The author also says that:

> "It seems more than likely, therefore, that many temporary restraining orders and preliminary injunctions are improperly issued, not because the judge is prejudiced, but because he is insufficiently informed." (Resp. br., pp. 58-59)

But the author has no evidence to support either his statement that such orders are "improperly issued" or that state court judges are "insufficiently informed."

Obviously, if there is something wrong with temporary restraining orders the remedy is for legislators to forbid them entirely—and in all cases, not just labor cases. Actually, the restraining order is a historic and commonly employed weapon in the arsenal of Equity, utilized by Chancellors for the protection of litigants in all phases of human activity whenever the legal remedy is inadequate. It affords speedy relief when time is of the essence. As so employed, it is a manifest good, and not an "evil."

F. The Respondents' "Uniformity" Argument Is Erroneous.

Throughout their brief, the Respondents have repeatedly emphasized their view that:

> "Uniformity is the desideratum of national labor policy and fits the ideal of the evenhanded rule of law." (Resp. br., pp. 12, 46-53)

The authorities cited for this view support only a much narrower proposition. Both *San Diego Building Trades Council* v. *Garmon* (1959) 359 U.S. 236, 3 L. Ed. 2d 775, and *Guss* v. *Utah Labor Relations Board* (1957) 353 U.S. 1, 1 L. Ed. 2d 601, (cited by the Respondents in footnote 22, page 46 of their brief) hold only that in the area assigned by Congress to the National Labor Relations Board the national policy is one of uniformity and Board jurisdiction preempts state jurisdiction. In *Guss, supra*, this Court observed that:

> ". . . in each case the question [of the state's power to act] is one of congressional intent. . . . And here we find not only a general intent to pre-empt the field but also the proviso to § 10(a), with its inescapable implication of exclusiveness." 353 U.S. at 10.

Likewise, in *Garmon, supra* (1959) 359 U.S. 236, 3 L. Ed. 2d 775, the Court observed that:

> "The extent to which the variegated laws of the several States are displaced by a single, uniform, national rule has been a matter of frequent and recurring concern. As we pointed out the other day, 'the statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation.' " 359 U.S. at 241.

The Court also stated that:

> "However, due regard for the presuppositions of our embracing federal system, including *the principle of diffusion of power* not as a matter of doctrinaire localism but *as a promoter of democracy*, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. . . . Or where the regulated conduct touched interests so deeply rooted in local feeling and respon-

> sibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U.S. at 243-44 (emphasis added).

It is evident, therefore, that under our Constitution and federal system, our national policy is one of "diffusion of power . . . as a promoter of democracy" and not one of "uniformity." This principle was emphasized by this Court when, speaking through Mr. Justice Brandeis, in *Erie R.R.* v. *Tompkins* (1938) 304 U.S. 64, 82 L. Ed. 1188, it stated that:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law." 304 U.S. at 78.

The Respondents state that:

> ". . . a federal judicial 'haven' is essential if federal policy is to be fully effectuated by law interpretation and fact determination responsive to the congressional plan." (Resp. br., pp. 39-40)

and that:

> "Without removal these questions will be decided by state courts that may be inhospitable to or unaware of national labor policy." (Resp. br., pp. 42-43)

If Congress had agreed with such reasoning, it could very easily have provided, in enacting Section 301, that the jurisdiction of federal courts to enforce labor agreements would be exclusive. This is what Congress did in the National Labor Relations Act in an area where it thought federal law should be uniform and where it wanted to remove jurisdiction over the subject from the state courts.[30]

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[30] Section 10(a) Labor Management Relations Act, 1947, 29 U.S.C. 160(a) (1964).

This Court, in *Garmon, supra* (1959) 359 U.S. 236, 3 L. Ed. 2d 775, *Guss, supra* (1957) 353 U.S. 1, 1 L. Ed. 2d 601, and numerous other decisions to the same effect, has respected the intention of Congress as so expressed. In the area of contract enforcement, however, Congress did not distrust the states or consider them to be "inhospitable or unaware of national labor policy." This Court has found that Congress gave state courts concurrent jurisdiction over suits to enforce labor agreements.[31] The concept of "uniformity" was so foreign to the intention of Congress that even the applicable statute of limitations[32] and the applicable statute of frauds[33] were left by Congress to the states. In the words of Senator Ferguson " '[i]t takes away no jurisdiction of the State courts.' " *Dowd, supra*, 368 U.S. at 512.

The Respondents' contentions that the concept of "uniformity" is "not limited to the substantive interpretation of the contents of the collective bargaining agreement but extends to procedure and remedy as well" (Resp. br., pp. 12-13), and that Congress sought "to prevent 'forum shopping' by parties looking for a break under one set of rules or another" (Resp. br., p. 53) are conclusively refuted by *Dowd, supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, and *Hoosier Cardinal, supra* (1966) 383 U.S. 696, 16 L. Ed. 2d 192.

As an argument against state court injunctions, the Respondents assert, "There is no uniformity from one state court to another. Strike injunctions are grantable in some state courts but not in others." As pointed out above, our Constitution and federal system contemplates lack of uni-

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[31] Dowd, *supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483.
[32] UAW v. Hoosier Cardinal Corp. (1966) 383 U.S. 696, 16 L. Ed. 2d 192.
[33] Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers Union, (CA 6; 1951) 193 F. 2d 209, *cert. denied* (1952) 343 U.S. 966, 96 L. Ed. 1363.

formity. On many issues there is even lack of uniformity in the federal courts. On the issue in the instant case, the rule in the Third Circuit, as enunciated in *American Dredging Co.* v. *Local 25, Marine Div., Int'l Union of Operating Engineers* (CA 3; 1964) 338 F. 2d 837, *cert. denied* (1965) 380 U.S. 935, 13 L. Ed. 2d 822, was different from the rule in the Sixth Circuit. Indeed, it is elementary that on many issues rulings differ from circuit to circuit, and "forum shopping" among the several circuits in all fields of the law is common by petitioners who seek the circuit with the most favorable rule. Of course, diversity of decision on specific points can ultimately be resolved by the Supreme Court through the certiorari process, and diversity of decision among the several states can also be resolved in the same way.

In *Dowd, supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, this Court said:

> "Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule." 368 U.S. at 507-08.

The Court also said:

> "It is implicit in the choice Congress made that 'diversities and conflicts' may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States, as there evolves in this field of labor management relations that body of federal common law of which *Lincoln Mills* spoke. But this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law." 368 U.S. at 514.

On page 51, the Respondents refute their own "uniformity" argument by acknowledging that:

> "A § 301 action is maintainable even though the promise to be enforced duplicates a command of the National Labor Relations Act (*Smith* v. *Evening News Assn.*, 371 U.S. 195), or the controversy is otherwise within the regulatory scope of that Act (*Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261) . . . This Court holds that procedural arbitrability is to be determined by the arbitrator. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 554-559." [34]

As a reason for denying state court authority, and in support of its "uniformity" reasoning, the Respondents state that otherwise:

> "The employer might bring an action seeking a strike injunction in a state court and a separate action seeking damages in a federal court . . . An employer might seek injunctive relief in a state court and the union might seek a declaratory judgment based on the same events in a federal court." (Resp. br., p. 49)

But there is nothing novel about this. On this subject, Moore states, "the federal and state courts have concurrent jurisdiction, as, for example, in diversity and general federal question cases, actions *in personam* may proceed concurrently." Moore, 2d Ed., Vol. 1A, Sec. 0.221 at page 2605. He further states:

> "In the exercise of discretion a federal court should normally deny a declaratory judgment where the issues raised may be fully adjudicated in a suit pending in a state court at the time the federal declaratory judgment action is instituted." Moore, 2d Ed., Vol. 1A, Sec. 0.220, p. 2603.

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[34] Respondents' quotation at page 51 from San Diego Building Trades Council v. Garmon, *supra* (1959) 359 U.S. 236, 3 L. Ed. 2d 775 that "remedies form an ingredient of an integrated scheme of regulation" is similarly inapposite because Section 301, while conferring jurisdiction on federal courts, does not purport to establish any "integrated scheme of regulation."

Thus, the problem which the Respondents pose as a threat is a common one readily answered through the accommodations familiar to our federal judicial system.

As a corollary of their "uniformity" argument, the Respondents repeatedly assert that Norris-LaGuardia defines "national labor policy" and that Section 4 of Norris-LaGuardia has been "read into" Section 301. (Resp. br., pp. 14, 53-61) But, as pointed out above, Norris-LaGuardia, by its terms, applies only to courts of the United States, and Section 13(d) thereof defines such courts as those "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress . . ." If Congress had intended Norris-LaGuardia to state national labor policy, it would have written the Act to apply to *all* courts—*not* just to federal courts.

The oft repeated statements that this Court, in *Sinclair*, *supra* (1962) 370 U.S. 195, 8 L. Ed. 2d 440, "read Section 4 of the Norris-LaGuardia Act into Section 301 of the Taft-Hartley Act" (Resp. br., p. 61) and that under *Sinclair*, Norris-LaGuardia has been "incorporated in the National Labor Relations Act" (Resp. br., p. 54) are quite inaccurate. In *Sinclair*, this Court did not read Section 4 into Section 301. It affirmatively held, as the Petitioner here contends, that in enacting Section 301, Congress did not intend to change the *existing* coverage of Norris-LaGuardia. The Court said that Congress had expressed its "purpose with regard to the continued application of the anti-injunction provisions of the Norris-LaGuardia Act" (370 U.S. at 213) and specifically defined these provisions as proscribing "federal labor injunctions" (370 U.S. at 211) and restricting "courts of the United States of jurisdiction to enter" such injunctions. 370 U.S. at 203.

Clearly, the mere fact that Congress has enacted an applicable law does not in and of itself automatically deprive state courts of their historic jurisdiction. In 1947,

concurrently with the enactment of Section 301, Congress enacted Section 8(b)(1) of the Act. That section forbade union coercion of employees and made such conduct an unfair labor practice enforceable by the National Labor Relations Board. Even so, this Court held that the states retained their historic right to punish and enjoin strike violence. *UAW* v. *Wisconsin ERB* (1956) 351 U.S. 266, 100 L. Ed. 1162. Subsequently, the Court held that despite Section 8(b)(1) a state court could also enjoin non-violent "massed name-calling" where this was "calculated to provoke violence." *Youngdahl* v. *Rainfair, Inc.*, (1957) 355 U.S. 131, 2 L. Ed. 2d 151.

In the *Auto Workers* case, *supra*, the Court looked to Congressional intention in concluding that the states retain their historic authority to maintain law and order in the community. After reviewing legislative history, the Court said it was "obvious" that Section 8(b)(1) "was not to be the exclusive method of controlling violence even against employees" and that:

> "The Act does not have such regulatory pervasiveness. The state interest in law and order precludes such interpretation." 351 U.S. at 272.

The Court concluded:

> "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an Act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect." 351 U.S. at 274-75.

Comparable considerations in the instant case likewise require the conclusion that Congress intended the states to retain their usual jurisdiction to enjoin strikes in breach of contract, and that Section 301 and Section 1441(b) must

not be construed in such a way as to deprive the states of this historic jurisdiction. The impact of "wildcat" strikes on a local community sometimes can be as burdensome as acts of violence.

At pages 48-49, the Respondents misquote the petition for certiorari, stating that:

> "According to the petition for a writ of certiorari (p. 19), strike injunctions to enforce a no-strike promise are unavailable in fourteen states."

The Petitioner merely stated that "ten of the twenty-four States which currently have 'little Norris-LaGuardia Acts' . . . do not apply such Acts to strikes in breach of contract", and listed such states in footnote 17 to the certiorari petition. The Petitioner did not mean to imply that the other fourteen states have a contrary rule. The Petitioner simply was unable to find any decisions one way or another in most of such states and so could not express an opinion as to how such statutes are construed or whether they have ever come before the courts.

G. Arguments Advanced by Amicus Curiae, AFL-CIO, Are Erroneous.

The Amicus Curiae, American Federation of Labor and Congress of Industrial Organizations, in addition to arguments which have been answered above, advances additional arguments:

(1) *Zwickler* v. *Koota* (1967) 389 U.S. 241, 19 L. Ed. 2d 444, discussed on pages 8-9, is irrelevant to the issues in the instant case. *Zwickler* explores only "the scope of the discretion of the district courts to abstain from deciding the merits of a challenge that a state statute on its face violates the Federal Constitution." 389 U.S. at 245. The gist of *Zwickler* is that a federal court should *not abstain* from determining the validity of a state statute when it

Likewise, while Congress has invested the federal district courts with "original jurisdiction" of all civil actions "between citizens of different States" (28 U.S.C. § 41(1)(b) (1928), now 28 U.S.C. § 1332(a)(1) (1948)), and has thereby negatived jurisdiction absent a federal question where diversity of citizenship does not appear, lack of diversity does not void a judgment for want of jurisdiction. *McCormick* v. *Sullivant,* 10 Wheat. 192; *Des Moines Navigation & R.R. Co.* v. *Iowa Homestead Co.,* 123 U.S. 552. The judgments "are erroneous," reversible on appeal, but "they are not absolute nullities." *McCormick* v. *Sullivant,* 10 Wheat. 192, 199.

Finally, while the Constitution limits the "judicial Power" of the United States to "Cases" and "Controversies" (Art. II, Sec. 2), a decree is not open to collateral attack for lack of jurisdiction on the ground that there was no case or controversy essential to the exercise of judicial power. The "objection is not open on a motion to vacate. The court had jurisdiction both of the general subject matter—enforcement of the Anti-Trust Act—and of the parties. If it erred in deciding that there was a case or controversy, the error is one which could have been corrected only by an appeal or by a bill of review." *Swift & Co.* v. *United States,* 276 U.S. 311, 326. And the same is true of an objection that an injunction oversteps statutory limitations and therefore "renders the decree a nullity." *Id.* at 330. The "error, if any, does not go to the jurisdiction of the court. The power to enjoin includes the power to enjoin too much." *Id.* at 331.

In no meaningful analytical sense are these constitutional and statutory limitations different from the restrictions contained in the Norris-LaGuardia Act. Chafee, Some Problems of Equity, 369-372, 325-326

(1950). In all the limitations subsume the existence of judicial power but cabin its exercise. So with the Norris-LaGuardia Act. The term "jurisdiction" in the Norris-LaGuardia Act "refers to right principles of judicial action and not to power." *Id.* at 372.

4. The upshot

We have shamelessly drawn for our analysis on Professor Zechariah Chafee's penetrating study in Some Problems of Equity, 296-380 (1950). ". . . [E]quity jurisdiction is something entirely different from jurisdiction over the subject matter." *Id.* at 305. ". . . '[W]ant of equity jurisdiction' is not want of power. The possibility of awarding damages or some other form of legal redress is enough, and it is immaterial that only equitable relief is asked." *Id.* at 320. And this basic approach exactly fits the Norris-LaGuardia Act, as Professor Chafee tellingly explained (*id.* at 367-368):

> Does the Norris-LaGuardia Act limit the power of the trial judge or merely lay down right principles for his decision? . . . [C]learly the district judge had jurisdiction of the parties, and . . . he also had jurisdiction over the subject matter. The district court did have power to decide labor disputes, and it could at least award damages for acts which, the statute said, were not to be enjoined. This being so, nothing further was required to give the court power to act, which includes power to act wrongly. The Norris-LaGuardia Act, to repeat Mr. Justice Stone's distinction in the *DiGiovanni Case* [296 U.S. 64, 69], does not fix a limit on the "power of a federal court to act"; it merely answers the question "whether the case is one for the peculiar type of relief which a court of equity is competent to give." In short, the Act says, in effect, "No court shall have equity jurisdiction"; and lack of equity jurisdiction . . . is not lack of power.

Accordingly, "the preclusion of injunctive relief or 'equity jurisdiction', by force of the Norris-LaGuardia Act, is not an ouster of such 'original jurisdiction' of the district court over the parties and the subject matter as the removal statute contemplates and, in this kind of case, section 301 creates. The classic exposition of this position by Professor Chafee is so familiar, clear and fully reasoned that anything more than a citation of his analysis would be supererogation." Hastie, C.J., dissenting in *American Dredging Co.* v. *Local 25, Marine Division*, 338 F. 2d 837, 858 (C.A. 3), cert. denied, 380 U.S. 935.[16]

[16] To support a contrary view, petitioner invokes (br. p. 35, n. 31) Moore, Federal Practice, 2d Ed., Vol. 1A, Sec. 0.167[7], pages 1004-05, but the reliance is misplaced. Thus, at the cited pages, as is apparent from the cases in notes 15 and 16, the author is treating with lack of subject matter jurisdiction by reason of the preemption of the controversy by the National Labor Relations Board under the National Labor Relations Act. Preemption does go to the power of the court over the subject matter of the controversy (*In re Green*, 369 U.S. 689); it "involves the fundamental question of whether the . . . courts had any power whatever to adjudicate the dispute between the parties. Congress has invested the National Labor Relations Board with the exclusive power to adjudicate conduct arguably protected or prohibited by the National Labor Relations Act" (*Liner* v. *Jafco*, 375 U.S. 301, 306). Where preemption is the source of the court's incompetence to act, it does affect the subject matter jurisdiction of the court; and in that circumstance the question on removal is whether the federal court's undoubted authority to decide that the dispute is arguably within or without the ambit of the National Labor Relations Act is sufficient retention of judicial power to effectuate removal, even though an affirmative answer to the arguability question then divests the court of power to hear and decide the controversy. There is no such issue on removal of a § 301 action; a § 301 action is not preempted even though the underlying claim would also be cognizable by the NLRB (*Smith* v. *Evening News Assn.*, 371 U.S. 195); subject matter jurisdiction is therefore not implicated in any way. When, at p. 1009 of the treatise, the author addresses a § 301 action directly, it is unclear what his position is.

C. Removal of a § 301 Action Comports With the Purpose of Congress in Establishing Federal Question Removal

With the investiture by Congress of federal question jurisdiction in the federal courts these courts " 'became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.' " *Zwickler* v. *Koota,* No. 29, October Term, 1967, sl. op. p. 6, decided December 5, 1967. One means by which to effectuate this primacy was to establish federal question removal in order to provide the defendant as well as the plaintiff with a federal forum for the determination of federal questions. "It was deemed further advisable to give the right of access to the federal courts, in cases involving federal questions, not only to the plaintiff, but also to the defendant, who had been sued in the courts of a state, as more or less essential to the proper administration of the federal laws." Dobie, Federal Procedure, § 88, p. 346 (1928). Original federal question jurisdiction and federal question removal therefore draw their reason for being from the identical source. Hart and Wechsler, The Federal Courts And The Federal System, 729-733, 1019-1020 (1953). Congress established a national system of federal trial and appellate courts in order to assure independent, informed, uniform, and unparochial administration of federal law (Mishkin, *The Federal "Question" In The District Court,* 53 Colum. L. Rev. 157 (1953)); "a full system of independent federal courts plays a valuable part in furthering the rapid, widespread, yet uniform and accurate, interpretation of federal law" (*id.* at 171); and it plays perhaps an even more important role in fact finding upon which the application of law is crucially dependent (*id.* at 172-176); in totality, therefore, a federal judicial "haven" is essential if

federal policy is to be fully effectuated by law interpretation and fact determination responsive to the congressional plan (*id.* at 195). *See England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 416-417.

Removal of a § 301 action is in full keeping with the general recognition of " 'the primacy of the federal judiciary in deciding questions of federal law.' " *Zwickler* v. *Koota,* No. 29, October Term, 1967, sl. op. p. 10, decided December 5, 1967. As a § 301 action is exclusively bottomed on a federally-created right, removal is the precise means that Congress affords to a defendant to secure a federal forum to hear and decide a federal claim. In this case, in denigrating removal, the silent premise of petitioner's argument—and its major flaw—is that it travels from an allegation of a contract violation to entry of a strike injunction with no intermediate stop. But it is just at the trial stopover in putting the allegation to proof to determine whether a contract violation is shown, upon which the grant of any relief is dependent, that federal questions of law and fact are crucially implicated and for the adjudication of which a federal forum is provided by removal.

Illustrative federal questions that may be presented are these: (1) Was there any strike at all? *Drake Bakeries* v. *Local 50, American Bakery Workers,* 370 U.S. 254, 258, 266. (2) Was the strike over a matter expressly excepted from the scope of the no-strike promise? (3) Was the strike impliedly excepted from the scope of the no-strike promise because it was called over a matter expressly excepted from submission to final and binding arbitration? *Cf., Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95, 106. (4) In the

absence of an express no-strike promise, should one "be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration"? *Ibid.* (5) If the implication of a no-strike commitment is confined to arbitrable disputes, has "compulsory and binding arbitration . . . been agreed upon, and, if so, . . . what disputes have been made arbitrable"? *Ibid.* (6) While providing for compulsory terminal arbitration, does the agreement by its terms and history nevertheless negative a promise on the part of the union not to strike over an arbitrable matter? Compare *International Union, U.M.W.* v. *N.L.R.B.*, 103 App. D.C. 207, 257 F. 2d 211, with *Lewis* v. *Benedict Coal Corp.*, 259 F. 2d 346 (C.A. 6), affirmed on this question by an equally divided court, 361 U.S. 459. (7) Has the employer repudiated its promise to arbitrate the matter in controversy so as to free the union to strike over it? *Cf., Drake Bakeries* v. *Local 50, American Bakery Workers*, 370 U.S. 254, 260-263; *Vaca* v. *Sipes*, 386 U.S. 171, 185. (8) Was the strike provoked by and in protest against serious unfair labor practices and therefore not within the purview of the no-strike promise? *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 279-284. (9) Is a refusal to work because of an abnormally dangerous working condition not a strike as a matter of law so that the no-strike promise is not applicable? *N.L.R.B.* v. *Knight Morley Corp.*, 251 F. 2d 753 (C.A. 6), cert. denied, 357 U.S. 927. (10) As in this case, does the agreement itself preclude the issuance of a strike injunction as a means of enforcing the no-strike promise (*infra*, pp. 66-67)?

It is to provide a federal forum for the decision of these and a host of like federal questions that Congress

has made removal available to a defendant.[17] Without

[17] The deceptiveness of the facile assumption that it is easy to decide whether a strike during the term of an agreement is in breach of contract is shown by the following excerpt from Major Collective Bargaining Agreements, Arbitration Procedures, Bull. No. 1425-6, Bur. Lab. Stat., U.S. Dept. Lab., 91 (June 1966):

Despite the widespread prevalence of grievance and arbitration procedures and no strike-lockout pledges, a strike not constituting a violation of the letter of the agreement is possible in about half of all major agreements:

How strikes May Occur During the Term of Agreements Without Violating the Agreements

(1,717 major agreements)

Strikes banned	Strikes possible
Absolute ban on strikes (757)	
Not all possible disputes subject to grievance and/or arbitration (594)	
No arbitration (9)	
All disputes subject to arbitration (154)	
Limited ban on strikes (780)	
All disputes subject to arbitration (64)	Strikes banned over disputes subject to arbitration but not all possible disputes subject to grievance and/or arbitration (285)
	Arbitration provided but strike ban waived if agreement violated (331)
	Arbitration required mutual consent (35)
	No arbitration (62)
	Other (3)
No ban on strikes (180)	
All disputes subject to arbitration (25)	Arbitration provided but not all possible disputes subject to grievance and/or arbitration (118)
	No arbitration (37)
Total agreements ..... (846)	..... (871)

removal these questions will be decided by state courts that may be inhospitable to or unaware of national labor policy. Federal law will be fashioned without the sustenance of federal courts and correction of state errors in the federal area will have to await the necessarily limited attention that this Court can devote to this burgeoning field. Removal is Congress' solution when the civil action begun in a state court is within the "original jurisdiction" of a federal district court and "founded on a claim or right arising under the Constitution, treaties or laws of the United States. . . ." 28 U.S.C. § 1441(b). A § 301 action meets these two prerequisites and removal on the defendant's petition is therefore mandatory.[18]

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[18] *Sea-Land Service* v. *Hall*, 56 C.C.H. L.C. ¶ 12,263 (S.D. N.Y., November 6, 1967); *Oman Construction Co.* v. *Teamsters Local 327*, 263 F. Supp. 181 (M.D. Tenn.); *Katz* v. *Architectural & Engineering Guild*, 263 F. Supp. 222 (S.D. N.Y.); *Sealtest Foods Division* v. *Conrad*, 262 F. Supp. 623 (N.D.N.Y.); *Publishers' Assn.* v. *Printing Pressmen's Union*, 246 F. Supp. 293 (S.D.N.Y.); *Food Fair Stores* v. *Retail Clerks District Council*, 229 F. Supp. 123 (E.D. Pa.); *Tri-Boro Bagel Co.* v. *Teamsters Local 802*, 228 F. Supp. 720 (S.D.N.Y.); *H.A. Lott, Inc.* v. *Hoisting & Portable Engineers Local No. 450*, 222 F. Supp. 993 (S.D. Tex.); *Crestwood Dairy* v. *Kelley*, 222 F. Supp. 614 (E.D. N.Y.). And see, *Byrnes Express & Trucking Co.* v. *Drivers Local Union 816*, 56 CCH Lab. Cas. ¶ 12,307, p. 20,335 (E.D. N.Y., Nov. 27, 1967): ". . . [T]here appears to be no current authority for remanding a case such as this where both an injunction and damages are requested. Moreover, even if only an injunction has been sought, the heavy weight of authority is in favor of denying a remand and vacating the state restraining order."

See also, Aaron, *Strikes in Breach of Collective Bargaining Agreements: Some Unanswered Questions*, 63 Colum. L. Rev. 1027, 1040-1051 (1963); Notes, 51 Va. L. Rev. 973 (1965); 78 Harv. L. Rev. 1005 (1965); 22 Wash. & Lee L. Rev. 255 (1965); 60 Nw. U. L. Rev. 489 (1965); 38 Temp. L. Q. 361 (1965); 52 Cornell L. Q. 132 (1966); 14 UCLA L. Rev. 1130 (1967).

II. THE PROPOSITION THAT A STATE COURT IS EMPOWERED TO ISSUE A STRIKE INJUNCTION IN A § 301 ACTION IS IRRELEVANT TO REMOVAL AND ERRONEOUS

Resistance to removal stems exclusively from this Court's decision in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, that a federal court is precluded from issuing an injunction to restrain a strike over a grievance which is submissible to arbitration under a collective bargaining agreement. But displeasure with *Sinclair* has legally nothing to do with removal. Removal is mandatory on the defendant's petition if the "original jurisdiction" and "arising under" prerequisites are satisfied. They are in this case. Nothing else is relevant. The supposed availability of a strike injunction in a state court is beside the point. "The Federal court may . . . be obliged to deny an equitable remedy which the plaintiff might have secured in a state court." *Pusey & Jones Co.* v. *Hanssen*, 261 U.S. 491, 498. The civil action does not on that account cease to satisfy the "original jurisdiction" and "arising under" requirements. Accordingly, "even if the Norris-LaGuardia Act is considered operative only as a restriction on exercises of the federal equity jurisdiction, so that the state courts are thought free to grant injunctions in labor cases otherwise and substantively governed by federal law, that difference in equity jurisprudence between the two systems is not a ground for denying the right to remove." *Crestwood Dairy* v. *Kelley*, 222 F. Supp. 614, 617 (E.D. N.Y.); *Publishers' Association* v. *Printing Pressmen's Union*, 246 F. Supp. 293, 296 (S.D. N.Y.).

Indeed, were it true that a state court had power to issue a strike injunction, it would fortify the re-

movability of the action. For the disparity in equitable remedies, and the consequent lack of uniformity, are "unhappy consequences" that "can be avoided by the removal of such cases to a federal court." [19] At any rate, for those who believe the strike injunction is a salutary sanction, the proper quarrel is with the *Sinclair* decision, not with the conclusion that the action is removable because the sole prerequisites for removal have been met. The rules of removal and federal question jurisdiction should not be disjointed because one or another consequence of the grant or denial of removal is thought to serve a good, bad, or indifferent social or economic end.

Nevertheless, since the proposition that a state court has power to issue a strike injunction in a § 301 action is at the forefront of petitioner's argument and provides the excitation but not the legal justification for denying removal (pet. br. pp. 10-32), we now treat with this irrelevant contention and show that it is erroneous. Petitioner's argument in favor of a strike injunction to enforce a no-strike promise is virtually a replica of the argument which was urged but did not prevail in *Sinclair*. We do not retrace *Sinclair*. It has been decided and we begin with it. Analysis "must accept that the decision has been ingested into the federal labor policy." [20] This means that there is no longer room for the view that "injunctions against peaceful strikes are necessary to make the arbitration process effective. . . . [W]hatever might be said about the merits of this argument, Congress has itself re-

[19] Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 Colum. L. Rev. 1027, 1051 (1963).

[20] Aaron, *supra*, 63 Colum. L. Rev. at 1035.

jected it. In doing so, it set the limit to which it was willing to go in permitting courts to effectuate the congressional policy favoring arbitration and it is not this Court's business to review the wisdom of that decision." *Sinclair,* 370 U.S. at 213. Accordingly, given *Sinclair,* all that is properly left for decision is the question whether, although Congress determined that a strike injunction should not be grantable in a § 301 action in a federal court, it nevertheless concluded that the identical injunction should be grantable in an identical action in a state court. We now show that Congress did not legislate that idiosyncratic disparity.[21]

A. The Principle Which Governs § 301 Is Uniform Application of Paramount Federal Law

The desideratum of national labor policy is uniformity.[22] This is emphatically true of a § 301 action. "The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills,* requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy. . . . [T]he subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' . . . [I]n enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over incon-

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[21] *Independent Oil Workers* v. *Socony Mobil Oil Co.,* 85 N.J. Super. 453, 205 A. 2d 78.

[22] *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 241-243; *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1, 10-11.

sistent local rules." *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103, 104.[23]

Uniformity as the governing principle in a § 301 action fits the ideal of the evenhanded rule of law. Whether a state-created action is brought in a federal court via diversity, or a federally-created action is brought in a state court, the same bundle of rights should be identically defined and subject to essential similarity in the vivifying means of enforcing the claim or defense in one court as in another. In a state-created action the " 'nub of the policy . . . is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result.' " *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 204, quoting *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109. And in the enforcement of a federal right in a state court, "only if the federal law controls can the federal Act be given that uniform application throughout the country essential to effectu-

[23] See also, *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 657; *Smith* v. *Evening News Assn.*, 371 U.S. 195, 200. *Cf.*, *I.A.M.* v. *Central Airlines*, 372 U.S. 682, 692, observing that, as to a § 204 Railway Labor Act collective bargaining agreement, "The needs of the subject matter manifestly call for uniformity." The absorption of state statutes of limitation as the federal rule in a § 301 action reflects the unlikelihood that lack of uniformity in this minor sphere will "have substantial effect upon the private definition or effectuation of 'substantive' or 'primary' rights in the collective bargaining process" (*International Union, U.A.W.* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703, n. 4), the customary recourse to state statutes of limitations to govern the timeliness of federal actions in the absence of a specific congressional time-bar (*id.* at 703-704), and the consequent lack of need to bring to bear "a high degree of inventiveness from the courts" to the problem (*id.* at 701). *Hoosier Cardinal* is therefore not a retreat from the general desideratum of uniformity in the administration of § 301.

ate its purposes." *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361.[24] A federal court adjudicating a state right cannot "substantially affect the enforcement of the right given by the State." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109. Neither can a state court substantially affect the enforcement of the right given by the United States.

B. The Availability of a Strike Injunction in a State Court in a § 301 Action Would Result in a Crazy Quilt Destructive of Uniformity

The availability of a strike injunction in a state court but not in a federal court in the enforcement of a § 301 claim is at war with uniformity. The disparity is not limited to state courts and federal courts vis-a-vis each other. It is emphasized by lack of uniformity among the state courts as well.[25] Strike injunctions are grantable in some state courts but not in others. According to the petition for a writ of

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[24] See also, *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 243-246; *Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 296, 298-299. "[W]hen federally-created rights are enforced in the state courts . . . the cardinal consideration is federal paramountcy. . . . Moreover, federal paramountcy extends as much to procedural as to substantive matters; if the federal purpose is clear, and if it is valid, there is no room for local procedural autonomy . . . and this is true whether the federal purpose is evidenced by an express Congressional enactment of a 'procedural' character or is reasonably inferable from the substantive federal right in issue." Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?* 17 Ohio St. L.J. 384, 387 (1956).

[25] ". . . [R]easonable uniformity is notably absent in state law. States currently differ as to procedure, substantive, common law, and statutory law on the subject." Stern, *The Norris-LaGuardia Act and State Court Injunctions Against Strikes in Breach of a Collective Bargaining Agreement Under Section 301: Accommodation Against Incompatibility*, 39 Temp. L. Rev. 65, 77 (1965).

certiorari (p. 19), strike injunctions to enforce a no-strike promise are unavailable in fourteen states.[26] Disparity in the enforcement of a federal right would thus exist not only between federal and state courts but from one state court to another. A multi-state strike would be enjoinable in one place but not another.

But the variegation does not stop even there. The identical claim arising from the same strike could be in issue before both a state court and a federal court. The employer might bring an action seeking a strike injunction in a state court and a separate action seeking damages in a federal court (*supra*, pp. 26-27). An employer might seek injunctive relief in a state court and the union might seek a declaratory judgment based on the same events in a federal court. *Merchants Refrigerating Co.* v. *Warehouse Union, Local 6,* 213 F. Supp. 177 (N.D. Cal.). Thus, conflicting adjudication is threatened as to the very same claim with resolution dependent upon the fortuity of which judgment is first "obtained in one court which may be set up as *res judicata* in the other."[27]

Accordingly, were the grant of a strike injunction allowable in a state court in a § 301 action, the ensuing disparity with which the system would be shot through would destroy uniformity.

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[26] *E.g., Tidewater Express Lines* v. *Freight Drivers & Helpers Union,* 230 Md. 450, 187 A. 2d 685.

[27] *Penn General Casualty Co.* v. *Pennsylvania,* 294 U.S. 189, 195.

C. Uniformity Is Essential With Respect to All Meaningful Aspects of a § 301 Action Whether "Substantive," "Procedural," or "Remedial"

Petitioner contends that the uniformity which this Court's decisions have stressed as essential in § 301 actions is limited to the principles pertinent to interpreting the content of the collective bargaining agreement and does not extend to other matters (Pet. br. pp. 13-15, 32). This foreshortened view seriously misreads the import of this Court's decisions. The principles which this Court has fashioned in the procedural and remedial areas are at least as significant in § 301 actions as the rules pertinent to the interpretation of the agreement, and uniformity is essential with respect to all meaningful aspects of a § 301 action whether denominated "substantive," "procedural," or "remedial."

Lincoln Mills itself requires specific performance of an executory promise to arbitrate. Obviously a state court is no longer free in a § 301 action to apply its common law rule that an executory promise to arbitrate is not enforceable. This Court holds that, while an individual employee has standing to maintain a § 301 action (*Smith* v. *Evening News Assn.*, 371 U.S. 195, 200-201), he may not do so if he has not attempted to exhaust the grievance and arbitration procedure (*Republic Steel Corp.* v. *Maddox*, 379 U.S. 650), and not even then unless the union has defaulted in the discharge of its duty of fair representation (*Vaca* v. *Sipes*, 386 U.S. 171, 185-186). Obviously no state court is free inconsistently to hold that the individual employee has no standing, or that he need not attempt to exhaust the grievance and arbitration procedure, or that violation by the union of its duty of

fair representation is not a condition precedent to proceeding to judgment against the employer. A § 301 action is maintainable even though the promise to be enforced duplicates a command of the National Labor Relations Act (*Smith* v. *Evening News Assn.*, 371 U.S. 195), or the controversy is otherwise within the regulatory scope of that Act (*Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261), notwithstanding the customary exclusive jurisdiction of the National Labor Relations Board. Obviously no state court may inconsistently decline to entertain a § 301 action on the ground that an alternative remedy is available from the NLRB. This Court holds that procedural arbitrability is to be determined by the arbitrator. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 554-559. Obviously no state court can rule that it is for the court in a § 301 action. This Court has established the principle which governs the apportionment of damages when an employer has breached the collective bargaining agreement and the union has violated its duty of fair representation. *Vaca* v. *Sipes*, 386 U.S. 171, 195-198. Obviously a state court in a § 301 action is not free to enforce a different remedial scheme.

Clearly, therefore, uniformity is essential whether the controlling rule at issue is formally classifiable as "substantive," "procedural," "remedial" or a blend. "In fact, since remedies form an ingredient of any integrated scheme of regulation" (*San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247), and procedural rules "themselves dig into 'substantive rights' " (*Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 296), the procedure by which a right is realized and the remedy by which it is vindicated may well be more important than its substantive definition.

And that is plainly true of a strike injunction in a labor dispute. The fact is, "noted by all competent students of industrial relations, that in labor disputes the injunction remedy is inextricably linked with the rights of the parties involved; a strike may be won or lost, depending upon whether the employer's application for a temporary injunction or a temporary restraining order succeeds or fails . . . . Thus, to deny employers the injunctive remedy in Section 301 cases brought in federal courts, while permitting them to obtain that remedy in similar actions brought in state courts, would be to cause a marked disparity between the substantive rights of litigants under a law which purports to establish a common rule for all." [28] The "uniformity which the Court seeks is not a wooden uniformity of 'substantive' rather than 'remedial' law, but a uniformity meaningful in the light of the interests at stake. Such meaningful uniformity would be frustrated by a doctrine permitting either forum shopping for the purpose of securing an injunction in labor disputes or disparate results in the federal and state courts." [29] "Under the circumstances, distinguishing substantive and procedural law serves no useful purpose. Where so-called procedural law of the character embodied in the Norris-LaGuardia Act merges into, assumes the characteristics of, and becomes so much a part of substantive federal law and basic national policy that it cannot be rationally dis-

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[28] Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions,* 63 Colum. L. Rev. 1027, 1035-1036 (1963).

[29] Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II,* 59 Colum. L. Rev. 269, 279-280 (1959).

tinguished, the distinction should be discarded."[30] For "it is important that only one law and one scheme govern in the enforcement of collective agreements made in the federal arena. That is to prevent 'forum shopping' by parties looking for a break under one set of rules or another. To promote this policy the law must achieve the same results in both sets of courts, whether we call it substantive or remedial."[31]

D. The Norris-LaGuardia Act Expresses National Labor Policy Fully Applicable to the Adjudication of a § 301 Action in a State Court

Petitioner contends that the holding in *Sinclair* precluding the issuance of a strike injunction in a § 301 action stems solely from the Norris-LaGuardia Act applicable exclusively to federal courts, and that in a § 301 action in a state court "these inhibiting restraints are absent" (Pet. br. pp. 32, 10-11). But that is too crabbed an approach to the meaning of the Norris-LaGuardia Act. While in form a restriction upon the exercise of equity jurisdiction by the federal courts, "in the nation's social history few enactments can have been more emphatically substantive in impact than the Norris-LaGuardia Act." *Crestwood Dairy* v. *Kelley,* 222 F. Supp. 614, 617 (E.D. N.Y.). It is "a long-standing, carefully thought out and highly significant part of this country's labor legislation . . . and has been an important part of the pattern of legislation under which unions have functioned for nearly . . . [36]

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[30] Stern, *The Norris-LaGuardia Act and State Court Injunctions Against Strikes in Breach of a Collective Bargaining Agreement Under Section 301: Accommodation Against Incompatibility,* 39 Temp. L. Rev. 65, 78-79 (1965).

[31] Gregory, *The Law of the Collective Agreement,* 57 Mich. L. Rev. 635, 652-653 (1959).

years." *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195, 203 and n. 16. It expresses "national policy" and its equitable restrictions have substantive import. *United States* v. *Hutcheson,* 312 U.S. 219, 233-237. The public policy which it articulates and the bounds of a labor dispute which it marks were later incorporated in the National Labor Relations Act and continue to have full contemporary relevance (*supra,* p. 30). Indeed, but for the fear that it might founder under a now outmoded concept of substantive due process,[32] it is probable that its commands would have been written predominantly as positive declarations as well as equitable limitations.[33] Certain it is, therefore, that we must read the Norris-LaGuardia Act in its relationship to other law, not as a "tightly drawn amend-

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[32] *Ferguson* v. *Skrupa,* 372 U.S. 726.

[33] Witte, *The Federal Anti-Injunction Act,* 16 Minn. L. Rev. 638, 648-649 (1932):

> More substantial from a legal point of view but of far less practical importance was the criticism of the law professors who believed that the injunction problem should be dealt with through changes in the substantive law. "The cure to be effective must go to the root, and not simply to the legal remedy." These critics wished to have written into the federal statutes positive declarations that both strikes and boycotts are lawful and urged that the conspiracy and other doctrines which are fundamental in the law of labor combinations should be specifically annihilated.
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> This approach was rejected not so much because of differences over social policies as from political considerations. While the overwhelming majority by which the Norris-LaGuardia bill was finally passed may be considered evidence that a much more radical bill would have also received congressional sanction, this seems very doubtful even now to all who have been in close touch with the situation. But really determining was the fear that any bill framed on such lines would be held unconstitutional.

ment to a technically phrased tax provision", but as a statute expressive of national labor policy. *United States* v. *Hutcheson,* 312 U.S. 219, 234-236.

That must be its reading even if the focus is entirely procedural. For the preliminary issuance of a strike injunction determines the outcome of a strike without regard to the ultimate determination that the strike was or was not substantively rightly enjoined. The drastic effect of the so-called temporary remedy practically moots the substantive question of the right to the relief. And this of course was a principal evil against which the Norris-LaGuardia Act was aimed. As has been explained (Witte, *The Federal Anti-Injunction Act,* 16 Minn. L. Rev. 638, 653-654 (1932)):

> Strikes normally last only a short time, which makes the first action of the courts in labor injunction cases all but decisive in its effects upon the dispute. There is no way of measuring or compensating workmen for loss of a strike, which means that if an ex parte temporary restraining order is issued improvidently the injury to the defendants is truly irreparable.
>
> Ex parte temporary restraining orders constitute one of the outstanding abuses of injunctions in labor disputes. Very generally, these orders are drafted by the complainants' attorneys and signed by the judge without taking any testimony. Often they are found after a hearing to have been unwarranted or too broad in scope, but a modification, coming as it usually does months after the order was issued, is of little practical benefit to the defendants. In many cases there never is any hearing, as the strike is over before the appointed day.

Even if as "law interpreters" one were free to ask, as one is not,[34] whether the evil at which the Norris-LaGuardia Act is aimed has subsided, and whether the extirpation of that evil has lesser contemporary relevance as an expression of national labor policy than formerly, the answer would not be assuring. Judicial performance in this field remains unencouraging. See *I.L.A., Local 1291* v. *P.M.T.A.*, 36 U.S. Law Week 4001 (S. Ct., November 6, 1967). The consequence of a strike injunction remains determinative. "The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of . . . [the enjoined party's] rights and render entirely illusory" any resort to eventual appeal. *Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542, 550; *Liner* v. *Jafco*, 375 U.S. 301, 308. And the evil which national labor policy does not tolerate in a federal court is as fully alive when a state court issues a strike injunction, as the recent study of an informed and disinterested commentator shows (Aaron, *Labor Injunctions In The State Courts—Part II: A Critique*, 50 Va. L. Rev. 1147, 1156-58 (1964)):

> It is only when we shift our focus from substantive to procedural considerations (never forgetting, however, how much the two overlap) that the policies of the various state laws we have reviewed seem especially vulnerable to attack. And, in shifting the focus, let us concede for purposes of argument that the various types of conduct now held to be enjoinable are properly considered to be unlawful. Does it necessarily follow that they should also be subject to injunction? I think not.

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[34] *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 214-215.

My reasons are based on the findings and observations in the previous section of this Article dealing with procedural requirements. Despite the numerous and extensive procedural reforms introduced by the Norris-LaGuardia Act and its counterparts in a number of states, it remains a fact that the labor injunction, by its very nature, is a form of judicial power peculiarly subject to abuse. An injunction is ordinarily issued on the assumption that someone is committing an unlawful act which threatens irreparable harm to someone else, and for which there is no adequate remedy at law. If those were indeed the facts in every case, the only arguments left to the opponents of the injunction would be those against the morality or legality of the statute or public policy which declared the actions enjoined to be unlawful—arguments which I eschew. But the facts of a typical labor dispute which reaches the litigation stage are usually tangled and unruly; as any arbitrator knows the conflicting statements and allegations of the parties in complicated cases must be carefully sifted and evaluated before one can be reasonably certain of arriving at even an approximation of the truth. Indeed, it often happens that after the most exhaustive exploration of a complex dispute, the arbitrator still entertains substantial doubts that he is in possession of all the relevant facts. In his effort to get at them, however, he is aided by a more informal procedure than that which prevails in the courtroom, and he can often pursue indirect lines of inquiry which past experience, or the offhand remarks or behavior of witnesses, indicate may prove fruitful. The arbitrator's proper concern, as Dean Harry Shulman used to say, is not that he may hear too much that is irrelevant, but that he may not hear enough that is relevant.

Consider the sharply contrasting position of a trial judge hearing an application for a temporary

restraining order. Frequently, as we have seen, he will entertain the application in an ex parte proceeding, possibly on the basis of affidavits and argument, without testimony. It is safe to assume that in most instances he will have only slight familiarity, if any, with industrial relations practice; and frequently, he will have only meager knowledge of labor law. Add to these disadvantages a crowded docket prompting a perfectly natural desire to get rid of the case, and it becomes apparent that there is little chance that the judge will probe deeply enough beneath the plaintiff's allegations and the defendant's answers and become sufficiently well informed about the case to reach a reasonable judgment concerning the need for a restraining order.

If the case should subsequently go to a hearing on a motion for a preliminary injunction, the judge will take testimony, but the hearing will be subject to all the other handicaps mentioned above. In addition, though the rules of evidence will, perhaps, prevent the court from hearing much that is irrelevant, they will also practically always assure that he will not hear enough that is relevant.

There is also another factor to consider. The study of injunctions in Los Angeles County showed a strong tendency on the part of judges who had granted temporary restraining orders not only to refuse modifications of such orders, but also to grant subsequent motions for preliminary injunctions in the same cases. This suggests that judges, like the rest of us, are not receptive to suggestions that they may have acted precipitously or incorrectly and should publicly confess error by reversing themselves.

It seems more than likely, therefore, that many temporary restraining orders and preliminary injunctions are improperly issued, not because the

> judge is prejudiced, but because he is insufficiently informed. Sometimes the result is inconsequential to either party; in the case of certain deep-seated disputes, the judicial restraint of some outward manifestations of protest may intensify the conflict and delay the ultimate solution, but it will not destroy the defendant's position. In a great many, if not the majority, of cases, however, the restraining order or preliminary injunction spells defeat for the defendant's cause. Every objective study of injunctions in action since the publication of the pioneer work by Frankfurter and Greene has noted this result. Such a result is wrong, not because we can be sure that the defendant's cause is just and its objectives lawful—they frequently are not—but because the judicial power has been used prematurely and unfairly to aid one party to a private dispute.

The national labor policy which exorcises this evil in a federal court does not allow its manifestation in a state court in a § 301 action. And that the evil distinctly exists in a § 301 action in a state court is patent. The strike injunction in *American Dredging* was issued *ex parte*. 224 F. Supp. 985, 987. So was the strike injunction in this case (R. 9-10). The strike occurred, the complaint was prepared and presented, and the injunction was issued, all in a single day, all without notice to the Union, all without hearing one word of argument from the Union, and all in complete accord with state procedure. This issuance of an *ex parte* strike injunction in a § 301 action in a state court is typical.[35] And this typical practice is the reason that

[35] For examples of such state action noted in removed cases, see *Sealtest Food Div.* v. *Conrad*, 262 F. Supp. 623, 624 (N.D.N.Y.); *Food Fair Stores* v. *Retail Clerks District Council*, 229 F. Supp. 123, 125, 128 (E.D. Pa.); *Castle & Cooke Terminals* v. *Local 137, Longshoremen*, 110 F. Supp. 247, 248 (D. Haw.).

Congress came to the view that the "injunction process is an extremely harsh remedy. Particularly is this true when a restraining order is issued without any notice to any of the defendants; and in nearly every case in a labor dispute where an injunction is issued, the restraining order is the first step. The first knowledge which the defendant has is service of notice upon him that the restraining order has already been issued. Before he is given an opportunity to be heard, he is enjoined...." S. Rep. No. 163, 72d Cong., 1st Sess., 8.[35a]

"The nature of this procedure runs contrary to protecting 'concerted activities for the purpose of collective bargaining or other mutual aid or protection.'" *Food Fair Stores* v. *Retail Clerks District Council,* 229 F. Supp. 123, 128 (E.D. Pa.). Affirmation of this right of concerted activity is part of the public policy of the United States declared by section 2 of the Norris-LaGuardia Act (*Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195, 202), and the guarantee of this right is explicitly mandated by section 7 of the National Labor Relations Act. An injunction which restrains a strike in reliance on the erroneous claim that it is in breach of a no-strike promise may irremediably defeat recourse to protected concert vouchsafed by the Norris-LaGuardia Act and the National Labor Relations Act. This detrimental consequence is a principal part of the mischief against which the Norris-LaGuardia Act guards. It is no less a mischief when wrought by a state court injunction than by a federal court injunction. Accordingly, when a state court is called upon

[35a] In a nonlabor context, relying upon "the important considerations that led to the enactment of the Norris LaGuardia Act," Mr. Justice Frankfurter criticized the grant of temporary relief without hearing oral testimony. Concurring in *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293, 297-298.

to enforce a federal right, it is bound by the principle that "The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions." *I.A.M.* v. *Street,* 367 U.S. 740, 772. And so, when the crux of the action is the claimed enforcement of a federal right, a state court is not empowered to do what a federal court is debarred from doing.

"To sum up, the Supreme Court took a road in the *Sinclair* case from which it cannot turn back without repudiating the basis of that decision. Having read Section 4 of the Norris-LaGuardia Act into Section 301 of the Taft-Hartley Act, it should now rule that state courts enforcing rights arising under that section are prohibited from granting injunctions against strikes allegedly in violation of collective agreements. In so doing it would not be applying the jurisdictional limitations of the Norris-LaGuardia Act to the state courts; rather it would be applying the federal common law of Section 301."[36] ". . . [B]reach of contract strikes are not enjoinable in any court, state or federal, not because the Norris-LaGuardia Act applies to state courts, but because that Act defines federal policy with respect to the enforcement of federal labor contracts."[37] "To the federal statute and policy, conflicting state law and policy must yield." *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U.S. 173, 176. See also, *Local 20, Teamsters* v. *Morton,* 377 U.S. 252, 261; *Liner* v. *Jafco,* 375 U.S. 301, 308-309.

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[36] Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions,* 63 Colum. L. Rev. 1027, 1039 (1963).

[37] Ratner, *The Emergent Role of District Courts in National Labor Policy,* 17 Lab. L.J. 36, 43 (1966).

E. The Crux of the Matter Is That Preclusion of a Strike Injunction in a § 301 Action as a Matter of Federal Law Controls in a State Court Enforcing a Federal Right

The crux of the matter was exposed by Justice Carter in dissent in *McCarroll* v. *Los Angeles District Council*, 49 Cal. 2d 45, 315 P. 2d 322, 336, cert. denied, 355 U.S. 932: "The rights under the bargaining agreement being controlled by federal law, that law must also measure the remedies available for otherwise the federal law is not being applied. . . .[The injunction as] a remedy is more than mere procedure. It goes to the very essence of the right itself. . . . This is especially true in injunctions in labor disputes, such as an injunction against a strike. The case is usually won or lost at the preliminary injunction stage, even before the hearing on the application for a permanent injunction—the final judgment. . . . [T]he right not to be enjoined under the Norris-LaGuardia Act is a part of the federal right—a part and parcel of the rights which may be exercised with reference to bargaining agreements. Certainly a state court cannot give more relief (in fact, relief which will end the case) than a federal court when administering federal law. If it may, the requirement that the federal law be applied may well dwindle to nothing and there will be no uniformity as is sought by the federal Act in labor relations affecting interstate commerce. The right will be no greater than the remedy afforded for its protection which may vary from state to state. If as in *Brown* v. *Western R. of Alabama*, . . . 338 U.S. 294, the mere matter of state rules of pleading may not control in the enforcement of a federal law by a state court, then certainly the important and fundamental matter of allowing an injunction under state law cannot stand if the federal law forbids it." 315 P. 2d at 336, 338-339.

F. Sinclair Decided That Congress Rejected the View That a Strike Injunction Was Necessary To Make the Arbitration Process Effective; If the Question Were Still Open, the Need for a Strike Injunction Is Highly Problematical; and Any Problem Which Is Thought To Exist Is for Congress

Petitioner's pervasive theme is that Congress, in enacting § 301 to strengthen the enforcement of collective bargaining agreements, could not have meant to weaken existing remedial authority by disallowing the issuance of strike injunctions by state courts to enjoin strikes in breach of no-strike promises. But that argument founders because it is based on the *assumption* that Congress thought that the availability of a strike injunction was necessary to the efficacious enforcement of a no-strike promise. If that assumption were sound, *Sinclair* would have been decided the other way, for Congress surely did not intend the anomaly of effective enforcement of a federal right in a state court but enfeebled enforcement in a federal court. When Congress refused to lift the restrictions imposed by the Norris-LaGuardia Act on the issuance of a strike injunction by a federal court, it expressed its judgment that this form of relief was not necessary in a § 301 action and that any good it might promote was overbalanced by the harm it might cause. This judgment is as fully applicable to a state court as to a federal court in the adjudication of a § 301 claim. Given *Sinclair,* and its conclusion that Congress rejected the argument that "injunctions against peaceful strikes are necessary to make the arbitration process effective" (370 U.S. at 213), there is no room for the identical argument just because the § 301 action is brought in a state court rather than a federal court. Accordingly, petitioner's quarrel is in reality with the decision in

Sinclair. Acceptance of *Sinclair* as the law "really puts an end to the problem."[38]

Furthermore, were the issue still open, it is hardly datum, despite the fervent asseveration of the proposition by petitioner, that a strike injunction is important to secure performance of a no-strike promise. While certainly vexing in the individual situation in which it may occur, the overall incidence of strikes over grievances submissible to arbitration is doubtless quite small. In perspective we therefore deal with a fairly minor matter.[39] Furthermore, insofar as legal sanc-

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[38] Aaron, *supra*, 63 Colum. L. Rev. at 1035. Section 301 has of course accomplished the purpose for which Congress fashioned it. It has made a federal forum available unrestricted by antiquated niceties as to the suability of a union as a legal entity and unhampered by unrealistic service of process requirements. It has strengthened the enforcement of agreements by cleanly and unequivocally divorcing inquiry into the merits of the dispute (the arbitrator's function) from the question whether the parties had promised to submit the dispute to arbitration (the court's function) (*Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564); and by shielding the arbitration award from judicial displacement based on a court's disagreement with the arbitrator's determination of the merits (*Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593). And it has in other ways, substantively, procedurally, and remedially, made it possible to formulate a realistic law governing the administration of agreements. It has not provided for a strike injunction, but for many that is a virtue, not a weakness.

[39] The reports cited at p. 4, n. 6, of the amicus brief of Labor Relations Committee are uninformative. The reports give the incidence of strikes "During term of agreement," but do not say whether or not the particular agreement authorized strike action during the term, and therefore do not reveal whether or not the strikes violated the agreements. "Despite the widespread prevalence of grievance and arbitration procedures and no-strike pledges, a strike not constituting a violation of the letter of the agreement is possible in about half of all major agreements." Major Collec-

tions promote performance of the no-strike promise, the employer is free to discharge or discipline the strikers and their leaders,[40] a hardly inconsiderable deterrent to unauthorized strike action. In addition, a suit may be brought against the union to recover the damages caused by an illegal strike which it authorized. Unions are as little enchanted as any other institutions by the risk of a damage judgment which may empty or deplete their treasuries, and those who believe that exposure to a damage judgment does not operate as a significant deterrent have little experience with the decision-making process on the union side. Moreover, as most strikes in breach of a no-strike promise are wildcat in character and therefore unauthorized by the union, and which the union is already doing its best to stop, a strike injunction directed to the union adds nothing to its efforts to bring the strike to an end, and

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tive Bargaining Agreements, Arbitration Procedures, Bull. No. 1425-6, Bur. Lab. Stat., U.S. Dept. Lab., 91 (June 1966). Thus, the 1964-1967 GM-UAW agreement excepted from the no-strike promise any dispute over "production standards." CCH Labor Law Reporter, Union Contracts, ¶ 59,905, pp. 85,039 (§ .19), 85,047-08 (§§ .28, .29), 85,061 (§§ .59, .60). The reports cited in the amicus brief do show that, on any hypothesis, the incidence of contract-violation strikes during the term of the agreement is tiny. The report for the year 1965 is typical. As a percentage of total working time, the man-days idle during 1965 as a result of *all* stoppages came to .18 percent (p. 9), and of the total stoppages, the man-days idle as a result of stoppages *during the term of the agreement* came to 11.6 percent (p. 11). Accordingly, in relation to total working time, the man-days idle because of strikes during the contract term came to .021 percent, which must be further reduced by an unknown fraction to determine the incidence of strikes in violation of the agreement. Thus, in overall economic terms, in relation to total working time, the incidence of breach-of-contract strikes is necessarily trifling.

[40] *E.g., Modiglass Fibers Division*, 49 L.A. 697, sustaining the discharge of 58 breach-of-contract strikers.

a strike injunction directed to the men requiring them to return to work against their will is of doubtful constitutional validity [41] and of uncertain practical use.

Indeed, the agreement in this very case appears to be based on the premise that the means available to enforce the no-strike promise are limited to reliance on the Union's efforts to put an end to wildcat stoppages, to recovery of damages from the Union only if it defaults in performing that promise or is itself responsible for the stoppage, and to the discharge and discipline of breach-of-contract strikers. Article XIII of the argument provides that: [42]

> During the life of this Agreement, no work stoppages, strikes, or slow downs shall be caused or sanctioned by the Union and no lockouts shall be made by the Company.
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> The Union shall not be liable to the Company in any action at law for damages arising out of any interruption of the Company's operations which is in violation of any provision of this Agreement, if such interruption is neither instigated, authorized, sanctioned, ratified, nor supported by the Union; provided that it immediately takes all available steps to remedy the violation. If the foregoing conditions are complied with, the exclusive remedy of the Company for such violation shall be that any employee who engages in any violation shall be subject to immediate discharge or discipline by the Company.

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[41] *Cf., International Union, U.A.W.* v. *W.E.R.B.*, 336 U.S. 245, 251.

[42] The agreement was attached to the complaint (R. 5); the first paragraph of Article XIII is quoted in the complaint (R. 8); the second paragraph is not, nor is it elsewhere printed in the Appendix.

While not expressed in so many words, it is strongly arguable that a strike injunction is precluded by the terms and tenor of the agreement. An "action at law for damages" is the specified remedy if the Union "instigated, authorized, sanctioned, ratified," or "supported" the stoppage. If it is a wildcat stoppage the Union fulfills its obligation if "it immediately takes all available steps to remedy the violation." And if the Union complies with these conditions the Company's "exclusive remedy" "shall be" discharge or discipline of the strikers. This is the enforcement means that the parties themselves adopted. Their specification of this remedy ordinarily excludes any other. And the exclusion of a strike injunction mirrors the normal expectation in the administration of an agreement.

To the probable needlessness and inefficacy of a strike injunction as a sanction there must also be added the known abuse to which the strike injunction has been and will be put however abstractly just the cause in which it is enlisted. We need not go beyond this case to illustrate the vice. An *ex parte* injunction issued forthwith upon the filing of the complaint (R. 10), with no notice or opportunity to be heard extended to the defendants. The allegations of the complaint were accepted at face value, with no supporting showing other than a conclusory verification by the affiant that "he has read the foregoing bill, and that the allegations thereof are true except those made on information and belief, and these he believes to be true" (R. 10). Also accepted on faith was the complaint's representation that "Each and every alleged grievance above described should have been handled under the grievance procedure outlined in the collective bargaining agreement, and each suspension of work was in violation thereof" (R. 7-8). The *ex parte* injunction that issued ran not

only to the Union and its agents, but to all members as well, and it ran to them not only when acting in concert, but also when acting individually (R. 9).[43] The injunction was not limited to a suspension of work over matters submissible to the grievance and arbitration procedure. Nor was the injunction limited to a suspension of work, but extended to "any interruption of operations," and any interference with the "normal conduct" of business for the duration of the agreement (R. 9).[44]

[43] Contrast the requirement of section 7(a) of the Norris-LaGuardia Act that "no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof." Contrast as well the requirement of Rule 65(d) of the Federal Rules of Civil Procedure that an injunctive order "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." "The courts . . . may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co.* v. *N.L.R.B.*, 324 U.S. 9, 13.

[44] Contrast the observation of Mr. Justice Brennan in dissent in *Sinclair*, 370 U.S. at 225: "But there is no general federal anti-strike policy; and although a suit may be brought under § 301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy [like that favoring agreed arbitration], in such cases the anti-injunction policy of Norris-LaGuardia should prevail." And see *id.* at 228-229. Exemplified by this case, however, the unfortunate fact is that judicial circumspection in the issuance of strike injunctions rarely exists. Contrast also the injunction issued in this case with the limitations expressed in the bills introduced to modify the *Sinclair* rule, *infra*, p. 71, n. 49. In these bills a strike injunction is grantable in a § 301 action only if the agreement provides for "binding arbitration of any claim" of contract violation asserted by the union, and if the agreement further "expressly" provides that the limitations of the Norris-LaGuardia Act shall not apply.

Accordingly, the consequence of an injunction like that issued in this case would be that for the duration of the agreement its administration would be overhung by an omnipresent judicial decree with two thousand workers citable for contempt for its alleged violation. To say that this is an unprecedented and disquieting method of contract administration is to say the least. A strike injunction, whether pervasive or particularized, is alien to the true source of the viability of the grievance-arbitration and no-strike promises. The fact is that the system of agreed submission of grievances to arbitration and the concomitant adherence to a no-strike promise is not dependent on the availability of legal sanctions to make it work and is not repairable by legal sanctions if it does not work.[45] Despite the legal underpinnings provided by § 301, adjustment of contract claims through the grievance and arbitration procedure without strikes is essentially an autonomous system of self-government which draws its sustenance from the self-determined commitment of the parties to it. Viewed in this light the availability of a strike injunction is almost an irrelevancy. For "unions have a heavy stake in the orderly administration of collective agreements, and in the vitality of the arbitral process as an alternative to strikes. They want to utilize arbitration, not to sabotage it. In discussing the pathological situations where legal niceties regarding Norris-LaGuardia engage our attention, we should never forget that in most healthy situations the arbitration process will be invoked, and its result accepted, without a thought of strike action." [46]

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[45] Shulman, *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 262, 286-287 (1955).

[46] St. Antoine, *Comments,* 14 Lab. L.J. 362, 364 (1963).

All this suggests that the problem, if one exists, and a solution, if one is desired, is for Congress. When petitioner reminds, as it does (br. pp. 18-19), that "labor legislation is peculiarly the product of legislative compromise of strongly held views" (*N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179), the lesson to be learned, as this Court taught in *Sinclair,* is that the matter "is one of legislative policy properly within the exclusive domain of Congress—it is a question for lawmakers, not law interpreters" (370 U.S. at 215). Whether a strike injunction should be part of the judicial arsenal in a § 301 action, and the terms upon which it should be made available if it should be added, are issues which engage competing considerations whose resolution is quite unclear on the intellectual level and which are highly divisive and emotional on the partisan level.[47] And so what petitioner asks of this Court should be sought of Congress. "The principal consideration here rests on the proposition that resolution of contested issues touching upon sensitive areas of our social and economic life should be made by the electorally based and therefore responsive political institutions."[48]

This consideration is even more impelling now than when *Sinclair* was decided. It has been five and one-half years since that decision. Congress has not been persuaded to change the *Sinclair* rule. It has not acted

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[47] Proceedings of the Section of Labor Relations Law, Part II, American Bar Association, August 12-14, 1963, 41-54, 226-244.

[48] Wellington and Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair* v. *Atkinson,* 72 Yale L.J. 1546, 1563 (1963).

on bills designed to modify it.[49] When legislators are content to leave well enough alone judges should be slow to respond to a controversial claim of what the common-weal supposedly requires. Congress sits as well as this Court.

CONCLUSION

A § 301 action brought in a state court is within the "original jurisdiction" of a federal district court "*arising under*" *a law of the United States.* Removal is therefore mandatory upon the defendant's petition without more. The unavailability of a strike injunction in a federal court in a § 301 action when the suit

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[49] S. 2132, 89th Cong., 1st Sess., June 14, 1965, introduced by Senator Javits, and H.R. 9059, 89th Cong., 1st Sess., June 15, 1965, introduced by Congressman Reid, provided that "section 301 of the Labor-Management Relations Act, 1947, is amended by adding the following new subsection:

> "(f) The provisions of the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (29 U.S.C. 101-115), shall be inapplicable in any proceeding to enjoin the violation of, or to enforce an arbitration award arising out of an alleged violation of, a contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, if the contract includes (i) a provision for submission to binding arbitration of any claim asserted by such labor organization alleging a violation of such contract by such employer, and (ii) a provision expressly stating that the provisions of such Act approved March 23, 1932, shall be inapplicable in any such proceeding."

It should be noted that under these bills the inapplicability of the Norris-LaGuardia Act is dependent upon (1) a provision in the agreement for "binding arbitration" of any claim of contract violation asserted by the union, and (2) a provision in the agreement "expressly stating" that the limitations of the Norris-LaGuardia Act are not to apply.

is removed, and the supposed availability of a strike injunction in a state court in a § 301 action if the suit is not removed, are each irrelevant to removal. This case, accordingly, presents no question as to whether a state court is empowered to issue a strike injunction in a § 301 action. But if that question is reached, the answer is clear that a state court, like a federal court, is precluded as a matter of federal law from issuing a strike injunction in a § 301 action. The judgment should therefore be affirmed.

Respectfully submitted,

PLATO E. PAPPS
1300 Connecticut Avenue, N.W.
Washington, D. C. 20036

CECIL D. BRANSTETTER
CARROL D. KILGORE
216 Third Avenue, North
Nashville, Tennessee 37201

BERNARD DUNAU
912 DuPont Circle Building, N.W.
Washington, D. C. 20036

Attorneys for Respondents

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APPENDIX

Norris-LaGuardia Act (47 Stat. 70. 29 U.S.C. § 101)

AN ACT

To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act.

SEC. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for

the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

SEC. 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act.

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value.

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State.

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence.

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified.

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

SEC. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy be-

cause of the doing in concert of the acts enumerated in section 4 of this Act.

SEC. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof.

(b) That substantial and irreparable injury to complainant's property will follow.

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief.

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the juris-

diction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

SEC. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

SEC. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

SEC. 10. Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

SEC. 11. In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined) the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided,* That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

SEC. 12. The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

SEC. 13. When used in this act, and for the purposes of this act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or

more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

SEC. 14. If any provision of this Act or the application thereof to any person or circumstances is held unconstitutional or otherwise invalid, the remaining provisions of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

SEC. 15. All Acts and Parts of Acts in conflict with the provisions of this Act are hereby repealed.

Approved March 23, 1932.